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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellants,
vs.
VICKSBURG WATER WORKS COMPANY,
Appellee.

No. 133.

BRIEF OF APPELLEE ON MOTION TO DISMISS AND AFFIRM.

S. S. HUDSON,
MURRAY F. SMITH,
J. HIRSH,
Counsel for Appellee.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

NO. 133.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

vs.

THE VICKSBURG WATER WORKS COMPANY, APPELLEE.

BRIEF OF APPELLEE ON MOTION TO DISMISS AND AFFIRM.

MOTION TO DISMISS AND AFFIRM.

In the Supreme Court. October Term, 1905.

Mayor and Aldermen of the City of Vicksburg, Appellant,

vs.

The Vicksburg Water Works Company, Appellee.

Comes now appellee by its counsel appearing in that behalf, and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction, or right of appeal, direct from the United States Circuit Court where this appeal is taken from, because the only ques-

tions involved are questions that should be decided by the United States Circuit Court of Appeals, and the case should have been appealed to that court. This appeal should be dismissed.

1st. Because said final decree appealed from was entered in accordance with the mandate of the Supreme Court of the United States dated the 7th of April, 1902, in the case of The Vicksburg Water Works Company vs. The Mayor and Aldermen of the City of Vicksburg, 185 U. S., 65.

2nd. The case should be dismissed because the assignment of errors is not signed by appellant or its attorney.

3rd. The case should be dismissed because the clerk's certificate on its face shows that there is a certain exhibit left out and therefore there is not a complete transcript of the record as required by the rules.

And said appellee by counsel as aforesaid also moves the court to affirm said judgment or decree, from which said appeal purports to have been taken, because although the record may show that this court has jurisdiction of this appeal, yet it is manifest that said appeal was taken for delay only.

S. S. Hudson,
Murray F. Smith,
J. Hirsh,
Attorneys for Appellee.

STATEMENT OF THE CASE.

A concise, luminous and authoritative statement of the law and the facts, presented by the original and supplemental bill in this case, is contained in the opinion of this court, reported in Vol. 185, U. S., 65 *et seq.*, and we take the liberty of quoting from said statement:

"The Vicksburg Waterworks Company, a corporation of the State of Mississippi, filed, in February, 1901, in the Circuit Court of the United States for the Southern District of Mississippi, a bill of complaint against the mayor and aldermen of the City of Vicksburg, a municipal corporation of Mississippi. To this bill the city filed a demurrer and certain special pleas, and subsequently moved the court for leave to withdraw the demurrer and pleas, and for leave to file an answer alleging that said answer embodied all the matters of defense which were set forth in said pleas and demurrer, and also a motion to dissolve a temporary injunction which had been theretofore granted."

Certain orders were entered, to which this court in said statement refers, and finally, on July 3, 1901, the Circuit Court "entered the following order and decree":

"This cause coming on to be heard upon the motion to dissolve the injunction heretofore issued in this cause, and the court now being advised in the premises, and in appearing that there is no federal question involved in the controversy presented by the pleading, it is therefore ordered, adjudged and decreed that said injunction be, and the same is hereby, dissolved, and that the bill of the complainant be, and the same is hereby, dismissed, and that execution issue therefor for the cost in the case.

Subsequently, other orders were entered, and finally

an appeal was allowed to this court, and on July 4, 1901, a certificate was signed by the trial judge, which is set forth in full in said statement. This court, assuming the facts set forth, in said original and supplemental bill to be true so far as they were material to the questions involved in this cause, then stated the issues presented in the following language:

"By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886, the City of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'

The city received competitive bids for the construction and maintenance of said waterworks, and on November 18, 1886, at a special meeting of the board of mayor and aldermen, a committee reported that the bid made by Samuel R. Bullock & Company, of New York, was the best bid, and submitted the draft of an ordinance, entitled 'An ordinance to provide for a supply of water to the City of Vicksburg, in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns, for a supply of water for public use, and giving the City of Vicksburg an option to purchase said works.' This ordinance was then adopted."

and is set out full in said opinion. We embody herein only such portions as we regard as pertinent.

"On March 1, 1887, Samuel R. Bullock & Company assigned and transferred, under and by virtue of the fifth section of the aforesaid ordinance, all their rights and privileges acquired under the ordinance to the Vicksburg Water Supply Company, incorporated under the laws of the State of Mississippi, and the said company accepted in writing the said ordinance.

The bill further alleges the construction of the said

water plant, in accordance with the specifications contained in the ordinance, and the city accepted the same; that since the completion and acceptance of said waterworks, during a period of fourteen years up to about July, 1900, the said company fully complied with all the terms of the ordinance, and no complaint was made by the city with respect to the execution of the company's part of the contract, and the city, without question, paid to the water company the semi-annual payments stipulated for in the ordinance; that on the 8th day of August, 1900, a mortgage that the said company had previously made, and which had fallen into default, was foreclosed, and all the franchises, ordinances, contracts and property described and conveyed in said mortgage deed were sold to the Vicksburg Waterworks Company, a corporation under the laws of the State of Mississippi, doing business in the City of Vicksburg, and which became the owner of said waterworks property and entered into the operation of the same; that on October 18, 1900, the said The Vicksburg Water Supply Company executed a quitclaim deed to the said The Vicksburg Waterworks Company, conveying and assigning all rights, titles and interest it might have or might thereafter acquire in said waterworks property, franchises, ordinances and contracts; that the Vicksburg Waterworks Company gave the city notice in writing of the said purchase and assignment, with a written acceptance of the terms and provisions of the said ordinance; that since the completion and acceptance of the said waterworks the city continuously received and used the water furnished by said waterworks, during a period of about fourteen years; and said water has at all times been and now is good and wholesome for public and pricate use and adequate in supply for the needs of the city and its inhabitants; that said water so furnished from the time the city first received and accepted the same up to the present time is and has at all times been the same character and supply of water, and is and at all times has been in accordance with the said ordinance and contract entered into with said city by said S. R. Bul-

lock & Company, the said Vicksburg Water Supply Company, and the said Vicksburg Waterworks Company, and that the pressure maintained has at all times been and is now greater than required by said ordinance and contract.

Upon these allegations, the appellants claim that a contract was entered into between the city and S. R. Bullock & Company and their assigns, the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, which contract still exists and is within the protection of the Constitution of the United States.

The matters and things which are alleged by the appellants to impair the obligation of said contract and to destroy their property rights are mainly as follows:

On March 9, 1900, the legislature of Mississippi passed an act entitled 'An act to authorize the mayor and aldermen of the City of Vicksburg to issue bonds to the amount of $375,000, to purchase or construct, equip and maintain, a waterworks system; construct and establish a sewerage system; to purchase grounds for, erect and equip a city hall; construct the necessary buildings for a medical college, and for other purposes;' by which act, the bill alleges, the legislature assumed to annul and abrogate the aforesaid ordinance and contract the city entered into with said Bull lock & Company and their assigns in this, that, by reason of said ordinance and contract, said city has no right within the said period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company or their assigns, notwithstanding which said act authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks of said Vicksburg Water Company at the arbitrary and inadequate price fixed by the said legislative act. The bill further alleges that, in pursuance of said act, and as required by its terms and conditions, an election was held in said city on the 3d day of July, 1900, at which it was voted, by a majority of the votes cast, that said city should issue its bonds in the sum

of $150,000, to buy or construct waterworks for said city; that, on the 7th day of November, 1900, the city passed a resolution and ordinance as follows: 'Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises.' The bill further alleges that on December 7, 1900, the city filed a bill in the Chancery Court of the County of Warren, State of Mississippi, against the Vicksburg Water Supply Company and the Vicksburg Waterworks Company, averring, among other things, that the contract entered into with Samuel R. Bullock & Company was null and void, and the attempt by said mayor and aldermen was a gross abuse of their rights and powers; that the said mayor and aldermen had no right to make a contract for so long a period as thirty years, and beyond their official terms to bind the constituted authorities to pay rents for the said hydrants as therein stipulated; that the rates prescribed in said contract for the use of said hydrants and the rates charged by said company against domestic consumers are exorbitant and illegal, and said board exceeded its power and authority in making a contract stipulating during the period aforesaid for said rates; that the said mayor and aldermen, at a meeting held on the 5th day of November, 1900, resolved and declared that 'the said board no longer recognized any liability, under said contract, to said company, by reason whereof said complainants say that said contract no longer exists; that they are entitled, as against the Vicksburg Water Supply Company, to have said contract canceled and annulled and as against the Vicksburg Waterworks Company to a decree that said company have never acquired any rights in or to said contract, or if mistaken in this, by reason of the matters and things stated, they are entitled to have the same annulled and

canceled; praying that the said city may have said relief and such other and further relief as may appear just and proper.'

The present bill further alleges that said suit in the chancery court was brought on petition to the Circuit Court as involving a federal question, and that the same is now pending in that court upon a motion to remand.

The bill prays for an injunction to restrain the defendant from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and that said act of the legislature of Mississippi, adopted on March 9, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be declared to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchises and rights of complainant, and said act, ordinance and resolution, and each of them are alleged to be in contravention of the Constitution of the United States in this, that they impair the obligations of said contract between said city and said Bullock & Company and their assigns."

This court then held:

"*It cannot be seriously contended that, under the act of March* 18, 1886, *authorizing the city to provide for the erection and maintenance of a system of waterworks, and to contract with a party or parties to build and operate waterworks, and under the ordinance of the city of November* 18, 1886, *providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied*

with without question or complaint, for a period of fourteen years." (Italics ours.)

This court then finally held, as stated in the syllabus:

"By the act of March 18, 1886, the City of Vicksburg was authorized to provide for the erection and maintenance of a system of waterworks and the contract made in accordance with its provisions was within the power of the city to make, and the subsequent legislation, state and municipal, set forth in the bill, impair the contract rights of the water company, within the protection of the Constitution of the United States unless the city can point to some inherent want of legal validity in the contract."

And further (page 82):

"Or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract."

The *law of this case was then definitely settled*, and it remained only for the court below to enforce the mandate, unless the city could "point to some inherent want of legal validity in the contract," or "to some disregard by the Waterworks Company of its obligations under the contract." This court having thus considered the propositions of law presented by the bills, and definitely announced the law of the case, as far as the said bills were concerned, and conclusively settled the constitutional and jurisdictional questions, it was no longer within the power of the defendants in this case to question the law thus established, however vigorously theretofore they had denied it. It therefore simply remains now to be seen what occurred when the mandate reached the court below.

The mandate of this Honorable Court was dated the

8th day of May, 1902, and was filed in the Circuit Court May 12, 1902. (Rec., p. 98.) The answer to the original and supplemental bills was filed by the defendants by leave of court as of June 21, 1901 (Rec., p. 83), and appears on pages 63 and 78, inclusive, of the record. Depositions were taken, and on the 12th day of January, 1904, being a day of the January term, 1904, of the Circuit Court for the Southern District of Mississippi, Western Division thereof, the following motion, propounded both by the complainant and the defendants was presented to the Circuit Court for hearing:

"Motion to hear cause at Jackson, May, 1904, term next.

IN THE CIRCUIT COURT OF THE UNITED STATES,

Western Division of the Southern District of

Mississippi.

January Term, 1904.

Vicksburg Waterworks Company
vs.
Mayor and Aldermen of the City of Vicksburg.

To the Honorable H. C. Niles, Judge of the Circuit Court of the United States in and for the Southern District of Mississippi, Western Division thereof:

Now comes the defendant and complainant by their attorneys respectively and move the court to set the above entitled cause for trial at the next May term, 1904, of the said court to be held at Jackson, Miss., on the 2nd day of the said month; and to allow both sides

until the first day of March, 1904, within which to take testimony in this case.

HUDSON & FOX
SMITH, HIRSH & LANDAU,
Attorneys for Complainant.
W. J. VOLLER and
BRYSON & DABNEY,
Solicitors for Defendant."

(Rec., 109.)

Upon this motion the following order was entered:

"CIRCUIT COURT OF THE UNITED STATES,

Southern District of Mississippi,

Western Division thereof.

Vicksburg Water Works Company
vs.
Mayor & Alderman of the City of Vicksburg.

This day this cause came on to — heard upon motion of defendant and complainant by their attorneys to set the above entitled cause for hearing at the next May term, 1904, of this court, to be held at Jackson, Mississippi, on the first Monday of the said month, and to allow both parties until the first day of March, 1904, in which to take testimony in the said cause; and by consent of both parties thereto, it is ordered and decreed that the said cause be submitted for final hearing in vacation and that the same be set for trial by this court on the first day of said May term, 1904, of this court at Jackson, Mississippi on the 2nd day of said month; and it is further ordered and decreed that both parties to the said cause be allowed until the first day of March, 1904, in which to take testimony therein.

Ordered and decreed this 12th day of January, A. D. 1904.

H. C. NILES,
Judge."

(Rec., 110.)

Testimony was taken by both parties to the suit, comprising on behalf of complainant seventeen depositions, and on the part of the defendant eight depositions, including numerous exhibits. Certain motions were made relating to amendments and a continuance, but are not material to the present inquiry and will be referred to hereafter.

Finally, at the said May term of said Circuit Court at Jackson, Mississippi, after reading all of the depositions, as shown by the record, page 365, the following final decree as amended, was rendered:

"FINAL DECREE.

Vicksburg Water Works Company
vs.
Mayor & Alderman of the City of Vicksburg, Mississippi. } Equity No. 41.

This day this cause came on to be heard in accordance with the motion of complainant and defendant, filed January 12, 1904, and the order of this court on the hearing of said motion rendered the said January 12, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendants, proof and exhibits, and the court after hearing and attending the evidence and the arguments of counsel and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills and for full relief; it is thereupon hereby ordered, adjudged and decreed:

First. That the defendant, The Mayor & Aldermen

of the City of Vicksburg, be and is hereby perpetually enjoined from abrogating or taking away or from assuming to abrogate or take away the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant entitled 'An ordinance to provide for a supply of water to the City of Vicksburg in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns for a supply of water for public use and giving the said City of Vicksburg an option to purchase the said works, ordained the 18th day of November, 1886, approved by John W. Powell, mayor, November 19, 1886, being the ordinance contract, and franchise marked Exhibit 'B,' to the original bill of complaint, and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder.

Third. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows:

Resolved, 'That the mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the mayor & aldermen deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as

shall be necessary to determine the rights of the city in the premises.'

And also to rescind the ordinance or resolution of said defendant adopted the 7th day of February, 1901, when the said defendant adopted the report of the committee on water works as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the legislature of the State of Mississippi, approved March 9, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise.

Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance contract and franchise dated 18th of November, 1886.

Sixth. That the said defendant be and is hereby required to pay all monies due or owing or that may hereafter be due or owing to said complainant under and by virtue of said ordinance, contract and franchise.

Seventh. That the said defendant be and hereby is perpetually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water fixed by said ordinance, contract and franchise, until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth. That the said defendant be and is hereby enjoined from permitting any further connections for the conveyance of sewerage or excremental matter, with the storm sewer or culvert located on Washington street, city of Vicksburg, and the defendant is hereby directed and commanded within twelve months from this date to extend said sewer or culvert and construct an outlet therefor so as to discharge said sewerage and excremental matter into the Yazoo or Mississippi river below the intake pipe of complainant, provided that if the defendant is unable to construct or extend said sewer or culvert and construct

said outlet within twelve months from this date, it can apply to this court for good cause shown for an extension of time beyond the said period of twelve months.

Ninth. That said defendant pay the costs of this cause to be taxed. Ordered, adjudged and decreed this 18th day of May, 1904.

H. C. NILES,
Judge."

On the 9th day of November, 1904, what purports to be a petition of the defendant for an appeal was filed. (Rec., 369.) This petition does not contain the signatures of any solicitors. On the 8th day of November, 1904, what purports to be an assignment of errors was filed, but it is not signed by any solicitor, nor is it signed by the defendant. The alleged assignments of error are seven in number, printed on pages 370 to 372 of the record, both inclusive, and will be hereinafter referred to more specifically. An order dated November 9, 1904, allowing the appeal was granted by the learned judge. (Rec., 372 and 373.)

On the 28th day of November, 1904, the learned judge, upon the application of the defendant, permitted said defendant to file a copy of a lost order. (Rec., 376.)

Finally, the clerk, in attaching his certificate to the record (Rec., 377), affirmatively and specifically shows that the said record does not contain "Exhibit B" to the deposition of M. O. Crumpler filed November 20, 1902, which (he certifies) "is missing from the files and I am unable to find."

ARGUMENT.

I.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

We respectfully maintain that this court is without jurisdiction to hear this appeal, and that the questions presented by the alleged assignment of errors or the record are not reviewable in this court, and if properly subjects of an appeal, they are solely within the jurisdiction of the Circuit Court of Appeals for the Fifth Circuit.

We respectfully submit that relief was invoked in this court upon the erroneous assumption that because there was at one time a constitutional question involved in this case, this court can dispose of the controversies on the merits, and the assignments of error, justify this assumption, for they present no federal question.

There are seven alleged assignments of error, *and the first four* will be considered at one time, for they are all practically an attempted violation of the settled practice of this court, as they all seek to induce this court to reverse the court below upon rulings wholly discretionary with that court. These assignments are as follows:

"I. That the United States Circuit Court erred in allowing the City Water Works & Light Company to withdraw its petition filed in said cause on December 2nd, 1903, whereby it prays to be admitted as a party complainant, and also in allowing the said City Water Works & Light Company to withdraw its original bill

in the nature of the supplemental bill filed in said cause on the ..... day of May, 1904, and the said court erred in allowing the complainant to withdraw its consent to the filing of said petition and the said original bill in the nature of a supplemental bill, the order authorizing the withdrawal of said several papers being in words and figures as follows, to wit:

'This day came on to be heard the motion of the City Water Works & Light Company to withdraw from the files its petition herein filed December 2, 1903, and its original bill in the nature of a supplemental bill filed May 5th, 1904, with all exhibits and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent to the filing of said bill.

And the court being fully advised in the premises doth hereby order adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent.'

"II. The court erred in refusing to allow respondent to file a supplemental answer setting up that the said City Water Works & Light Company was an essential party complainant and that unless it should be made a party complainant the court could not proceed but must dismiss the bill.

"III. The court erred in refusing to continue the said cause on motion of respondent after it had permitted the City Water Works & Light Company to withdraw its petition and its original bill in the nature of a supplemental bill whereby it sought to be named a party complainant in said cause and after it had permitted the complainant to withdraw its consent for the City Water Works & Light Company to be made a party complainant.

"IV. The court erred in granting the complainant's motion to strike from the evidence interrogatories No. 135, 136, 137, 138, 139, 140, 141, 142, 143 and 147 propounded to witness M. O. Crumpler and the answers thereto, the said interrogatories and answers being as follows, to wit:

'X. Int. 135. Mr. Crumpler, what has become of the corporation heretofore existing and known as the

Vicksburg Water Works Company, have you surrendered your franchise?

Ans. We have not. It has simply sold out what property it had to the City Water Works & Light Company.

X. Int. 136. It has now no property of any kind whatever?

Ans. No, sir.

X. Int. 137. What business is it now engaged in carrying on?

Ans. Nothing.

X. Int. 138. How long since it has been engaged in carrying on business or owned any property?

Ans. First of December, 1903?

X. Int. 139. What corporate act or acts, if any, has it done since the first of December, 1903.

Ans. I don't know of any except in winding up its business.

X. Int. 140. It has no property and is carrying on no business, what further business has it to wind up?

Ans. It is winding up the accounts that belonged to the company.

X. Int. 141. It does, then, as a matter of fact, still own some accounts and claims against people?

Ans. Yes, sir.

X. Int. 142. Then when you said that it had no property, you meant that it had no tangible property—I meant that it had no water works or anything of that kind.

X. Int. 147. But it does have claims, rights, choses in action and things of that kind unwound up?

Ans. Yes, sir.

X. Int. 147. You are the manager of the new company, the City Water Works & Light Company, the same as you were the manager of the old company, the Vicksburg Water Works Company, are you not?

Ans. Yes, sir."

(Rec., 370 and 371.)

relates to an alleged error of the court below in permitting the withdrawal of certain pleadings by the complainant, and the second to the refusal of the court to permit defendant to file certain pleadings. In other words, they are simply an attack upon the action of the court below in refusing to permit amendments to the pleadings. In *Chapman* v. *Barney*, 129 U. S., 677, this court held:

"Amendments are discretionary with the court below and are not reviewable by this court; this rule applies to an amendment substituting a new sole plaintiff for the sole original plaintiff."

In that case one of the assignments of error relied on was the following:

"The court erred in permitting a new sole plaintiff to be substituted for and in the place of the sole original plaintiff."

This court said (page 681):

"We do not think the first assignment of error well taken. Amendments are discretionary with the court below and are not reviewable by this court." Citing:

Mandeville v. *Wilson*, 5 Cranch., 15.
Sheehy v. *Mandeville*, 6 Cranch., 253.
Walden v. *Craig*, 9 Wheat., 576.
Chirac v. *Reinicker*, 11 Wheat., 280.
Wright v. *Hollingsworth*, 1 Pet., 165.
United States v. *Buford*, 3 Pet., 12.
Matheson v. *Grant*, 2 How., 263.
Ex parte Bradstreet, 7 Pet., 634.

Mr. Taylor in his work on Jurisdiction and Proceed-

ings in the United States Supreme Court, Sec. 380, p. 605 *et seq.*, says:

"Error is never assignable as to matters properly within the exercise of the discretion of the inferior court, such as are involved in questions of amendment —and the like." Citing a large number of cases.

In view of the positive language of these cases, it is difficult to understand why such an assignment of error should be pressed upon the attention of this court. If the substitution of one sole plaintiff for a sole original plaintiff was not reviewable in this court, as was announced over fifteen years ago in *Chapman* v. *Barney, supra,* how can a hearing be asked upon a proposition which denies the right to complainant to so frame his pleadings that he will continue to be until the final decree what he started out to be—a sole plaintiff?

THE SECOND ASSIGNMENT OF ERROR

relates to matters also entirely within the discretion of the court below, because it shows *on its face,* that the court refused to permit defendant to file any subsequent pleading,—in other words, refused to permit it to amend its pleading, and as the court, under the authorities cited, has a right to permit an amendment of the pleadings, it also has a right to keep the pleadings intact and prohibit amendments. These two assignments of error we submit are absolutely without merit. But in support of the action of the court below, it may be proper to call attention to what actually transpired in that court which is now the subject of criticism here, by refer-

ence to the record. We have already shown by extracts from the record that on the 12th day of January, 1904, both the complainant and the defendant joined in an application to the learned court below for permission to extend the time for taking testimony, and for an authoritative announcement on the part of the court that this long-protracted litigation would be definitely determined at a fixed day of the next term of the Circuit Court, which was to be held in Jackson in May, 1904. The court, responding to this rare act of co-operation between complainant and defendant, by a positive decree, as we have seen, extended the time for the taking or depositions as requested, and selected the said May term as the date for the final hearing of this cause. At that time the cause stood for hearing upon the original and supplemental bills, which were reviewed by this court in 185 U. S., *supra*, and the answer of the defendait theretofore filed. It is true on December 2, 1903, a petition of the City Water Works & Light Company, to be substituted as complainant in said cause in lieu of the said Vicksburg Water Works Company, was filed, but no leave of court, however, was obtained to file said petition at the time, nor at any time subsequent thereto prior to the said May term, 1904. At the said May term, after all the depositions were completed, to wit, May 2, 1904, the said City Water Works & Light Company moved the court to grant its petition filed on the second day of December, 1903, and then the said Vicksburg Water Works Company, the complainant, consented to the filing of said petition and the granting of the relief therein prayed, all of which appears in the record, pp. 110 and 111. The court, however, did not

grant permission, for the filing of said petition, said motion and said consent of the Vicksburg Water Works Company, but the defendant, on the 5th day of May, 1904, thought proper, in advance of any action on the part of the court, to respond to the said interlocutory pleading, and answered said petition as follows:

"CIRCUIT ———— OF THE UNITED STATES,

Southern District of Mississippi.

Vicksburg Water Works Company, *vs.* Mayor & Aldermen of the City of Vicksburg,	#41.	Chancery.

Now comes the defendant, The Mayor and Aldermen of the City of Vicksburg, and for answer to the petition filed herein on December 2, 1903, by the City Water Works & Light Company or to so much and such parts thereof as defendant is advised it is necessary or material for it to answer, answering says:

That it denies that the City Water Works and Light Company, a corporation under the laws of the State of South Dakota, purchased by deed or otherwise, that it now owns the property, real and personal, or any part thereof of The Vicksburg Water Works Company, complainant herein, or that the said City Water Works & Light Company purchased or now owns the choses in action and in possession or the rights, claims and demands or all the evidences of debt or in any wise appertaining to the said complainant, The Vicksburg Water Works Company, as alleged in said petition; and defendant further denies that the said City Water Works & Light Company, has any interest in the subject-matter in said suit or that it should be admitted as a party complainant in this suit.

W. J. VOLLER,
BRYSON & DABNEY,
CATCHINGS & CATCHINGS,
For Defendant."

(Rec., 111, 112.)

On the 5th day of May, 1904, the complainant filed, also without leave of court, its original bill in the nature of a suplemental bill, which appears on pages 112 to 168, inclusive, of the record.

In this attitude of the record, with an agreement of the parties deliberately entered at the January term, 1904, to extend the time of the taking of depositions to a day certain, to wit, until the 1st day of March, 1904, with a positive date fixed for the final hearing of this cause, with certain papers filed without the consent of the court, and with an express denial entered by the defendant, as late as May 5, 1905, that the City Water Works & Light Company had not purchased, and did not own the property of the Vicksburg Water Works Company, and an express denial that the said City Water Works & Light Company had any interest in this suit,—the complainant, on the 11th day of May, 1904, duly notified the defendant (Rec., 168), "that we will appear before the Honorable H. C. Niles, in the federal court room at Jackson, Mississippi, tomorrow, May 12, 1904, at nine o'clock A. M., sharp, and respectfully ask the court to hear and determine in accordance with the previous order of the court, the above entitled case (*Vicksburg Water Works Company* v. *Mayor & Aldermen of Vicksburg*), upon its merits. You are further hereby notified that we withdraw the petition of the City Water Works & Light Company filed in this cause on the 2nd day of December, 1903, and the original bill in the nature of a supplemental bill filed by the said company on the 5th day of May, 1904, and you need not answer either the said petition or the said bill. We wish to avoid all delay and procure if possible an early determination

of this controversy." Service of this notice was accepted (Rec., 168) by Messrs. Bryson & Dabney, for the defendant, on the 11th day of May, 1903 (1904), the day of its date. Having filed these papers, without the leave of court, the right of the complainant to withdraw them, we submit, was absolutely without question. They could have no force and efficacy without the sanction of the court, and could have been treated as so much waste paper. But the defendant itself, challenged the truth of the petition and in view of its attitude, and in view of its agreement to try this case finally at that time, was in no position whatever to object to such withdrawal. Yet, the complainant, desiring to conform strictly to the decree rendered at said January term, 1904, fixing a definite date for the hearing of the cause, and to take no final action without the sanction of the court, on the 13th day of May, 1904, in conjunction with the said City Water Works & Light Company, filed a motion, appearing on page 169 of the record, asking leave to withdraw from the files, the petition filed December 2, 1903, the original bill in the nature of a supplemental bill filed May 5, 1904, and the said written consent of the Vicksburg Water Works Company, and on the same day the Circuit Court made the following order:

"Vicksburg Water Works Co.
vs.
Mayor & Aldermen of the City of Vicksburg,

This day came on to be heard the motion of the City Water & Light Co. to withdraw from the files its petition herein filed December 2, 1903, and its original bill in the nature of a suplemental bill filed May 5th, 1904, and all exhibits and the motion of the Vicksburg

Water Works Co. to withdraw from the files its written consent to the filing of said bill.

And the court being fully advised in the premises doth hereby order, adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent.

This May 3rd (13th), 1904.

(Rec., 170.)

H. C. NILES,
Judge."

The power of the court to grant such order is not subject to successful denial in any case; but, we submit, that it is beyond just criticism of any sort in this cause. The defendant had denied in its answer the allegations of the intervening petition, which, as we have shown, had been filed without any authority of the court, and was assuredly estopped in this state of the record, to deny the truth of its own allegations; having itself raised the issue, so far as it could, that the City Water Works & Light Company had no interest in the controversy, it could not, in the face of its formal denial, be heard to assert the contrary. Having thus maintained that the City Water Works & Light Company had no interest in the controversy, that company had the right to gracefully retire. It would be a singular proposition to maintain in any court that after a defendant has formally declared an attempted intervenor an interloper, and unequivocally denied the truth of every allegation upon the faith of which his intervention is based, still to maintain that although you are such an interloper, you have no right and standing here, that though you are unnecessarily injecting yourself into a controversy and prolonging it without right, nevertheless, you cannot *get out*, you must stay in; in other words, seeking

to eject him with both feet, and holding him back with both hands. The proper course for an interloper in such an attitude is to retire as quickly as possible. In this case the City Water Works & Light Company did just exactly what the pleading of the defendant, if true, and the defendant cannot deny its truth, required that it should do if it wished to avoid controversy—quietly withdraw from the arena of conflict. But a due regard for proprieties induced the complainant and the City Water Works and Light Company to obtain the sanction of the court to its withdrawal, and this it did. How could the court do otherwise? First, the papers were filed without leave; second, the defendant denied that the City Water Works & Light Company had any right to inject itself into the controversy; third, the parties had deliberately agreed to terminate the taking of testimony by March 1st, and try the case at the May term. Therefore, even in the absence of any authoritative adjudications which were controlling, the action of the court is *above* censure. On this same 13th day of May, 1904, the defendant appears with a supplemental answer and asks the court for leave to file the same. This supplemental answer appears in the record on pages 171 to 178. This answer if allowed to be filed would nullify the deliberate agreement of the parties entered into January, 1904, and the solemn decree of the court fixing the day of the trial, entered January 12, 1904. But even this answer, among other things, makes the following allegation (Rec., 173):

"Defendant shows that the said attempted conveyance to the said City Water Works & Light Company is null and void and that it derived no title thereto, *yet,* that complainant can invoke no relief against the same in a court of equity."

Thus exclaiming that said attempted conveyance is null and void, although seeking to use it as a defense —in other words, to blow hot and cold. Coupled with this supplemental answer was a motion of defendant "for a continuance with leave to take testimony to support the allegations in said supplemental answer." (Rec., 171.) Here was an unequivocal and emphatic declaration on the part of the defendant that not only did it desire, in this late stage of the controversy, to prolong the case by the introduction of a new pleading, but to lengthen the already protracted delay by asking further time to take testimony. Having by formal declaration, as we have shown, announced that the attempt of the City Water Works & Light Company to assert an interest in the litigation was without merit, there seems to be no occasion unless such pleading was removed from the record, which had not been done, to take further proof. So far as the record is concerned, the City Water Works & Light Company admitted the truth of the defendant's denial by removing itself from the field of contention. But there are broader grounds for the refusal of the court to protract this expensive and wearisome litigation. The original bill was filed on February 16, 1901. By a deliberate agreement in January, 1904, the parties consented to a final determination in May, 1904. Testimony was taken upon every matter of fact at issue necessary to complete the complainant's case, and the defendant took all the testimony that it thought proper upon any issue of fact it sought to raise. The case therefore was ready for trial at the said May term in accordance with said agreement and the previous order of the court. Consequently when this motion,

for continuance with leave to file the supplemental answer was presented to the court, the day it was filed, the court very promptly entered the following order:

"In the Circuit Court of the United States,

For the Western Division of the Southern

District of Mississippi.

Vicksburg Waterworks Company
vs.
Mayor & Aldermen of the City of Vicksburg.

This day came on to be heard defendant's motion this day filed for leave to file the supplemental answer attached to the said motion and for a continuance with leave to take testimony in support of the allegations of the said supplemental answer, and the court having heard the arguments of counsel and being advised in the premises it is considered that the said motion be and it is hereby overruled.

So ordered this 13th day of May, 1904.

H. C. Niles,
Judge."

(Rec., 179.)

Thereupon the court proceeded to hear this case upon the original bill, amended and supplemental bill, exhibits, answer of defendant, proof and exhibits, and on the 18th day of May, 1904, entered a final decree sustaining the bill of complaint, and judicially announced in the very first paragraph of the decree:

"This day this cause came on to be heard in accordance with the motion of complainant and defendant filed January 12, 1904, and the order of this court

on the hearing of said motion rendered the said January 12, 1904."

(Rec., 364.)

We submit that the correctness of this action is beyond cavil.

THE THIRD ASSIGNMENT OF ERROR

is based upon the refusal of the court to grant a continuance. Forty-eight years ago, "this court (in *Thompson* v. *Selden, et al.*, 20 How., 194), again decides that it rests in the sound discretion of the court below to grant or refuse a motion to continue a case; and a writ of error from such a judgment will not lie." Chief Justice Taney, speaking for the court, says (p. 198):

"And as regards the motion to continue the case, it has often been decided by this court, that the refusal of an inferior court to continue a case to another term cannot be assigned for error here."

We are aware of no case subsequent to that date maintaining a contrary doctrine.

THE FOURTH ASSIGNMENT OF ERROR

is governed by the same principles of law that we have already invoked in the discussion of the three preceding assignments of error. There was nothing in the record after the action of the court in granting the orders to which we have hereinbefore referred, relating to the City Water Works & Light Company, which made admissible or permissible any evidence referring to the said City Water Works & Light Company. Such evidence had no bearing upon any point in controversy, and being thus incompetent and irrelevant, was properly ruled out by the court upon the application of the complainant. It is too plain for argument, that the evidence must be admissible under the pleadings, and as

the City Water Works & Light Company had then no connection with this controversy, the testimony of Mr. Crumpler, objected to by complainant, which referred wholly and solely to the said company, was eliminated by the court from consideration. This action affords the appellant no ground for relief here.

THE FIFTH ASSIGNMENT OF ERROR

is as follows (Rec., 371):

"The said court erred in rendering the final decree against respondent because the said decree is contrary to the law and the facts as stated in the pleadings and proof before said court."

This announcement practically announces that the court erred in rendering the final decree, because said decree is contrary to the law and the facts, as stated in the pleadings and proved before said court. We are unable to ascertain from this assignment what special cause of complaint the appellant proposes to submit for review. If assignments of this character are permissible, the object intended to be accomplished by an assignment of error is defeated. All that it would be necessary to do, so far as the legal effect of this assignment is concerned, is simply to file a petition for an appeal. This assignment was equivalent to the request set forth in the concluding part of the assignments that said final decree may be reversed and said cause remanded. As was well said in *Lloyd* v. *Chapman*, 93 Fed. Rep., 599, the purpose of an assignment of error is "to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court." Rule 35 expressly defines an assignment of error, and pre-

scribes it to be one "which shall set out separately and particularly each error asserted and intended to be urged." An assignment so general in its character and scope, as the one under consideration, is objectionable not only in form, but in substance. What particular facts appearing in this record does appellant rely upon to justify the allegation in this assignment, that the decree was contrary to the facts? What principle of law does it invoke that said decree violates? The assignment is useless, in the investigation of any particular principle or principles of law or propositions of fact presented in the record

"An assignment of error that the judgment below was for plaintiff, whereas it should have been for defendant, cannot be noticed."

Taylor on Jurisdiction and Proceedings, Supreme Court of the United States, p. 607.

Citing:

Stevens v. *Gladding*, 19 How., 64.

This fifth assignment being thus wholly inadequate under the rules of this court, as we construe them, does not require and further consideration from us.

The sixth assignment is as follows:

"Said court erred in perpetuating by its final decree the injunction against respondent restraining it from building a water works plant of its own."

Appellee insists that there is not a *single assignment of error*, which asserts that the Circuit Court erred in passing upon any question involving the construction of the constitution and laws of the United States, or the law of the state or a municipality in contravention of the Consitution of the United States,

or the jurisdiction of the court below. Without these assignments, either in whole or in part, no appeal lies, under the act of the 3rd of March, 1891, direct to the Supreme Court of the United States from the Circuit Court, and therefore we contend this cause should be dismissed. This court at its October Term, 1901, in this case (185 U. S. Rep., 65-81), held:

"That the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but discloses an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

This enunciation, authoritative and irrevocable, settled we submit the law of this case beyond discussion, so far as the jurisdiction of the court, the constitution, and any proposition of law presented by the original bill and supplemental bill are concerned. It is beyond the power of either the complainant or the defendant to reach this court for the purpose of securing a reconsideration of such questions. In this case, the con-

stitutional and jurisdictional principles, are no longer the subject of appeal.

Conceding the full force of the rule: "If a claim is made in the Circuit Court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained, or rejected, "that this court will review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. (*Loeb* v. *Columbia Tp.*, 179 U. S., 472-478), we contend that the only questions which can be raised under any of the subdivisions of Section 5 of the act of the 3rd of March, 1891, "must be real, and the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked."

Lampasas v. *Bell*, 180 U. S., 276-284.

And we further maintain that when the Federal controversy is ended, the jurisdiction of this court terminates. The appellate jurisdiction of the Supreme Court is based, by the very language of the statute, upon the fact that the case involves the construction or application of the Constitution of the United States, but when that application and construction is conclusively settled, this court's connection with it, in view of the very purpose for which the intermediate court, the Circuit Court of Appeals was created, should cease. For instance, assuming that the complainant in this case, after the decision in its favor on the former appeal declaring the existence of a Federal question, and sustaining the jurisdiction, was accepted as binding law by the court, and upheld by the court

below, but the decision of that court had been against the complainant on the merits, would that complainant have a right of appeal to this court on the merits? In other words, is this Federal question, conclusively determined and disposed of, to be permitted to remain in the case interminably as the basis of an appeal to this court upon every issue or proceeding that might arise in the case, wholly foreign to any Federal question, simply because at one time this court had jurisdiction by reason of an undetermined Federal question? We submit that the act must have a reasonable construction, that so long as there is really a Federal question in the case, asserted, either by the complainant or the defendant, the jurisdiction of this court on appeal will be upheld, but that when that Federal question, has by judicial utterance been eliminated, every other minor or subordinate question, or those that relate to the merits, should find a hearing, if at all, in the Circuit Court of Appeals. It seems to us clear, that so far as the complainant is concerned, the proposition that it cannot have an appeal *on the merits*, after the court has sustained the jurisdiction in the court below, is no longer open to controversy. This court in *Anglo-American Provision Company* v. *Davis Provision Co., No. 2*, 191 U. S., 376, has recently announced, "when the Circuit Court has decided the question of its jurisdiction and the alleged unconstitutionality of a state law in favor of the plaintiff, but has decided against him on the merits, the plaintiff cannot appeal directly to this court under the act of March 3rd, 1891, C. 517, Sec. 5, for the purpose of a revision of the judgment on the merits." This is a construction of the act which places a limitation upon the broader

meaning of its terms. In the Anglo-American Provision Company case, this court interpreted the words of the statute, to wit:

"In any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States" saying:

"Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this court whenever the decision is against him, no matter on what grounds, although his contention about the state law is sustained. If a party comes into the Circuit Court alleging that a state law is unconstitutional, and the Circuit Court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal."

Reaffirming *Lampasas* v. *Bell*, *supra*.

If the plaintiff is barred, there is no reason, we submit, based upon reason or justice, which should endow the defendant with higher rights than those possessed by the plaintiff. This court has again recently held, in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., 544, that its "jurisdiction to review Circuit Court decree extends to all cases in which question as to constitutionality of state statute is decided against claim of either party."

Rose's U. S. Supreme Court Digest, Vol. 1, p. 881.

The defendant, can therefore, also appeal to this court in cases involving the construction of the Constitution, and his rights must be gauged and limited, under like circumstances, by the same standard employed in the determination of complainant's, other-

wise there would be an intolerable discrimination in favor of one class of litigants over another. It must be admitted that the defendant in the Circuit Court, can when the facts justify it, interpose as one of its defenses an issue involving the construction or application of the Federal Constitution; but, should that issue be sustained by the Circuit Court and yet upon the adjudication of the entire case the Circuit Court decided against the defendant on the merits, could the defendant, having sustained its contention on the constitutional or jurisdictional point, and having lost the entire case on the merits, appeal to this court for the review of the judgment on the merits, simply because it had raised a constitutional or jurisdictional question and succeeded? The answer, we submit, is obvious. It cannot be done. The rules concluding the plaintiff, as clearly and distinctly enunciated in *Anglo-American Provision Company* v. *Davis Provision Co. No. 2, supra*, also conclusively fixes the status of the defendant when occupying the same attitude, so far as the constitutional or jurisdictional questions are involved. Therefore, it follows that, notwithstanding the broad and comprehensive language of the statute, which confers upon this court jurisdiction to entertain an appeal from the Circuit Court in cases wherein constitutional questions are involved, that right of appeal of the litigant is not indefinite and perpetual, but is girded by reasonable restriction. This court has well said in *Carey* v. *Houston & Texas Central Railway*, 150 U. S., 170 and 179, "The Judiciary Act of March 3, 1891,—has uniformly been so construed and applied as to promote its general and manifest purposes of lessening the burden of litigation in this

court"; and it can justly be said, "why should this court, whose dockets are crowded with cases, involving vital principles affecting the welfare of the people of the United States, the determination of the intricate questions presented by the ever expanding legislation, deemed necessary for the promotion of the best interests of the citizens of the respective states, or for the government of the territories or the countries subject to the jurisdiction of the United States, or bearing upon the relations between the United States and Foreign Countries, be called upon, because there might have been, at one time, in the case, some constitutional question, although thoroughly settled, to gravely decide whether a continuance should have been granted, in a case of no special moment to the great body of the public, or whether an amendment should have been permitted, or a paper allowed to be withdrawn from the files?" The test here is and must necessarily be that in order to hold an appeal maintainable, *under this clause* of the statute, "the construction or application of the Constitution of the United States must be involved as controlling."

Carey v. *Houston & Texas Ceneral Railway, supra.*

This court has again said, in *Cornell* v. *Green,* 163 U. S., p. 75:

"In order to give this court appellate jurisdiction under the act of March 3, 1891, C. 517, Sec. 5, upon the ground that the case 'involves the construction or application of the Constitution of the United States', a construction or application of the Constitution must have been expressed or requested in the Circuit Court."

If the constitutional question has once been decided by this court and, there remains nothing for the court below to do but to execute the mandates of this court, then so far as the right of appeal is concerned, the constitutional question is no longer controlling. In fact, it is eliminated. The power no longer exists in either party to the litigation to request "the construction or application of the Constitution" by the court.

In *Carey* v. *Houston & Texas Central Railway, supra,* the appeal was dismissed.

"No appeal will lie to the Supreme Court from the Circuit Court direct on the ground that the construction of the Constitution was involved, where the case was treated throughout by the court below as depending upon a question of chancery practice, not of constitutional right."

Rose's Digest, p. 881, citing.
Cornell v. *Green, supra.*

In the case last cited the appeal was dismissed for *want of jurisdiction,* and the court quoted the following from the previous case of *Ansbro* v. *United States,* 159 U. S., 695, 697, 698:

"And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a case which the record does not show were raised in the court below, and rulings assigned thereon, so as to give jurisdiction to this court under the 5th section of the act of March 3rd, 1891."

And it is pertinent in this connection to note that the assignment of errors in this case does not undertake to present either by direct expression or implication, any Federal question. The fifth assignment, as

we have already shown, is general in its character, and objects only to the decree as rendered, without specifying any particular reason for such objection.

The Sixth Assignment of Errors

simply presents an objection to the act of the court below in perpetuating the injunction, which to all practical intents and purposes this court in its former opinion had already adjudicated, upon the face of the bill, to have been properly issued, and does not on its face purport to present a Federal question. Taking all the assignments together, as we interpret them, the sole purpose of the appellant is to secure a review of this case upon the merits. If the appellant came to this court with a view of having a constitutional question raised, the duty devolved upon it to present the constitutional question clearly and distinctly in its assignment of errors, and then, if such an assignment of errors was not supported by the record, the constitutional question thus submitted would have been entitled, under all the authorities, to no consideration. But the appellant, we submit, could not, had it attempted, have raised a constitutional question in this case, for that question is no longer open to review. This court on the former appeal, 185 U. S., 65, for all practical purposes indisputably found and established, upon the face of the original and supplemental bills, first, that there was a constitutional question involved; second, that the said bills were not susceptible to demurrer; third, that the complainant was entitled to relief, unless the defendant could show (a) "some inherent want of legal valid-

ity in the contract," (and necessarily it must have been some inherent want of legal validity not presented in the pleadings, and not involving a constitutional question, because the court had already adjudicated "that the subject-matter of the contract was within the power of the city to make," and that it could not be seriously contended that under the act of March 18, 1886, and under the ordinance of the city of November 18, 1886, no contract was entered into; (b) or "point to some such disregarded by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract",—in other words, present some question of fact going to the merits, which justified this attempted repudiation on the part of the city of its obligations. Under the repeated adjudications of this court, matters involved in the former appeal, and the constitutional question was beyond controversy involved in the former appeal, and was the controlling issue decided, can no longer be propounded here. In referring to the cases, we use Roses's Digest, page 213:

"Upon an appeal from proceedings under a mandate, directed to a lower court, nothing is before the court, but the proceedings subsequent to the mandate.—*Himeley* v. *Rose*, 5 Cranch, 314."

"Upon a second appeal, there is nothing before the court but proceedings subsequent to the mandate on the first appeal."

Washington Bridge Co. v. *Stewart*, 3 How., 424.

Tyler v. *Magwire*, 17 Wall., 283.

The Lady Pike, 96 U. S., 462.

"After mandate disposing of first appeal, a second

writ of error brings up for revision nothing but the proceedings subsequent to the mandate."

Roberts v. *Cooper*, 20 How., 481.

Cook v. *Burnley*, 11 Wall., 677.

"Questions expressly or impliedly decided upon first appeal, are not open for review at second appeal."

The Nuestra Senora De Regla, 108 U. S., 101.

Rose's Digest, p. 214:

"None of the questions which were before the court on a first writ of error can be reheard or re-examined upon a second."

Sizer v. *Many*, 16 How., 103.

Supervisors v. *Kennicott*, 94 U. S., 499.

Clark v. *Keith*, 106 U. S., 465.

Chaffin v. *Taylor*, 116 U. S., 572.

Thompson v. *Maxwell Land, etc., Co.*, 168 U. S., 456.

Bent v. *Miranda*, 168 U. S., 471.

This court has recently announced in *Illinois* v. *Illi-Central Railroad Company*, 184 U. S., 77-91, quoting from the earlier case of *Roberts* v. *Cooper*, 20 How., 467, *supra*, that:

"After a case has been brought here and decided, and a mandate issued to the court below, and a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error to a court of appeal of last resort upon the same questions which were open to appeal on the first, would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate

litigant could, by repeated appeals, compel the court to listen to criticisms on their opinions, or speculate on chances from changes in its members—We can now notice, therefore, only such errors as are alleged to have occurred in the decisions on question which were peculiar to the second trial."

And added:

"To the same effect are numerous cases, some of which are cited in the margin."

And further said:

"We therefore do not stop to consider, as the appellant insists we should do, whether this court erred in any particular in its opinion or judgment on the former appeal in respect of any matter then determined. Every matter embraced by the original decree of the Circuit Court and not left open by the decree of this court was conclusively determined as between the parties by our former decree, and is not subject to re-examination on this appeal."

We respectfully ask, What is open for examination on this appeal, so far as a jurisdictional or constitutional question is concerned? That, to quote from the language of this court in *Illinois* v. *Illinois Central Railroad Company, supra,* "was conclusively determined as between the parties by the (our) former decree, and is not subject to re-examination on this appeal."

If our contention is correct, the only matter open to examination on this appeal would be the action of the court below in passing upon questions solely within its discretion, as has been repeatedly decided by this court, and questions going to the merits of the case, and even the latter questions are not, we submit, cognizable here, under the rulings above cited, but must

be presented to the Circuit Court of Appeals for the Fifth Circuit.

A further analysis of the former opinion in this case shows, as we understand it, that there has been removed from the sphere of discussion, first, any question of the power of the city to make this contract; second, any contention that the contract was not entered into; third, and pretension that the ordinance of the city of November 7, 1900, and the subsequent action of the city in voting at an election authorizing the issue of bonds to buy or construct a waterworks system of its own and refusing to pay the amount due and payable under the terms of the ordinance, did not present a constitutional question. What then, was the duty of the court below when the mandate reached it? It was compelled, first to recognize that the subject-matter of the contract was within the power of the city to make; second, that the contract was entered into; third, that the ordinance of the city, and the action of the city in holding an election to authorize the issuance of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, were questions already adjudicated by this court to be jurisdictional and constitutional questions; and of course it did not then lie in the mouth of the defendant by any pleading to show that there was no contract entered into and that the subject-matter of the contract was not with the power of the city to make; and unless it could show, as a matter of fact, that the city did not pass such an ordinance, and that the city did not have an election held for the purpose named, and that the

city did not refuse to pay the amount due and payable under the terms of the ordinance, the defendant was also bound by the conclusions of this court. When the case reached the court below, the defendant by its answer did not deny, although its capacity for denial seems manifest by a mere perusal of its answer, those facts which this court held to involve a constitutional question, but on the contrary admitted those facts, as the answer will show. The answer of the defendant appears on pages 63 to 78, inclusive, of the record, and may be regarded, in some respects, as a discussion of the mere value of words, a criticism of the phraseology of the bill, or some parts thereof, and an argument in support of the defendant's position. Those portions of the answer which present alleged substantial defenses, or possess any evidential character, are limited. We now propose to extract from said answer such matters therein as may be regarded as material in any view of the case, so that this court can see exactly what issues were involved in the hearing before the learned Circuit Court.

ADMISSIONS.

Under this head we will now cite those portions of the answer which admit the allegations in the bill which this court said, if true, presented a constitutional question.

No. 1. "They admit that the board of mayor and aldermen on November 7, 1900, adopted a resolution which is in words and figures as follows: That the mayor be and he is hereby instructed to notify the Vicksburg Water Works Company that the mayor and aldermen deny any liability upon any contract for the use of the waterworks hydrants; that from and after

August, 1900, they will *pass* (pay) a reasonable compensation for the use of said hydrants." (Rec., 64.)

This is the ordinance thus admitted to be passed to which this court refers.

No. 2. "Your respondents admit *that* the averments in said bill that an act of the legislature was passed authorizing the City of Vicksburg to issue bonds for the purpose of contracting a city hall and a sewerage system and also for the purpose of either purchasing or building a waterworks system and authorizing the issue of one hundred and fifty thousand dollars ($150,000) for the latter purpose." (Rec., 70.)

No. 3. "Respondents admit that in pursuance of said act of the legislature an election was held to determine whether bonds should be issued for the purpose of building a city hall, of constructing a sewerage system and of buying or building a waterworks." (Rec., 71.)

No. 4. "Respondents admit the passage of the ordinance on the 19th day of November, 1886, a copy of which appears as Exhibit 'B' to complainant's bill." (Rec., 69.)

This Exhibit "B" is the contract between Samuel R. Bullock & Company and the defendant, set forth in forth in the former opinion of this court.

No. 5. "That afterwards, to wit, on the ..... day of ....., in pursuance of the authority conferred by this section (Section 5) the said Samuel R. Bullock & Co. did cause to be organized a corporation under the laws of the State of Mississippi known and designated as the Vicksburg Water Supply Company, to which said corporation said contract was assigned by the said Samuel R. Bullock & Company, and became bound with the consent of the mayor and aldermen to the terms of said contract." (Rec., 67.)

No. 6. "Respondents say that it is immaterial whether the said city has received for the past fourteen years without complaint, water from the Vicks-

burg Water Supply Company of a like character with that furnished by the Vicksburg Water Works Co." (Rec., 70.)

These admissions in the answer show conclusively the existence of a contract and the delivery of water thereunder for fourteen years without complaint (for, although the defendant did not deny that last allegation of the bill, but simply said it was imaterial, it necessarily admitted it), upon which the opinion of the Supreme Court was based. This cannot be successfully denied or questioned. All the balance of the answer refers to matters relating to the merits, if the term "merit" can be applied to anything that the defendant undertook to show in this case, which had no connection whatever with the constitutional question, and therefore, as we have heretofore sought to maintain, are solely cognizable by the Circuit Court of Appeals. This answer was in the record on the former appeal, and so far as the main legal propositions therein presented are concerned, they were vigorously pressed upon the attention of the court by the counsel then representing the defendant, as will be perceived by an inspection of the brief filed on that occasion. The *facts in* this case, independently of those involving a constitutional question, and upon which the opinion of the court was also based in the determination of the legal propositions submitted by the defendant and stated in the bill of complaint, and which go to the merits, were also either admitted by the answer or sustained by the proof. Among the things that could not be denied were the following:

First. That the legislature passed the act of the

18th of March, 1886, authorizing the city of Vicksburg to provide for a water works system.

Second. That the city of Vicksburg on November 18, 1886, enacted an ordinance, made Exhibit "B" to the bill of complaint, whereby it contracted with "Samuel R. Bullock & Company, their associates, successors and assigns, for a supply of water for public use, and giving the city of Vicksburg an option to purchase said works"; and that by section 1 of said ordinance it was provided, "That in consideration of the public benefit to be derived therefrom the *exclusive* (italics ours) right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance."

That section 5 of said ordinance provides:

"Samuel R. Bullock & Company, their associates, successors or assigns may procure the organization of a water works corporation under the laws of any state and may assign to it all the rights and privileges acquired hereunder," etc.

"That on March 1st, 1887, Samuel R. Bullock & Company assigned and transferred (Supreme Court opinion, 185 U. S., p. 77), all their rights and privileges acquired under the ordinance to the Vicksburg Water Supply Company, incorporated under the laws of the State of Mississippi, and the said company accepted in writing the said ordinance."

"That the said water plant was constructed in accordance with the specifications contained in the ordinance and the city accepted the same."

"That since the completion and acceptance of said

water works during a period of fourteen years up to about July, 1900, the said company fully complied with all the terms of the ordinance, and no complaint was made by the city with respect to the execution of the company's part of the contract, and the city without question paid the water company the semi-annual payments stipuated for in the ordinance."

"That on the 8th day of August, 1900, a mortgage that the said company had previously made, and which had fallen into default, was foreclosed, and all the franchises, ordinances, contracts and property described and conveyed in said mortgage deed were sold to the Vicksburg Water Works Company, a corporation under the laws of the State of Mississippi, doing business in the city of Vicksburg, and which became the owner of said water works property and entered into the operation of the same."

Third. "That on October 18, 1900, the said Vicksburg Water Supply Company executed a quitclaim deed to the said The Vicksburg Water Works Company, conveying and assigning all rights, titles and interest it might have or might thereafter acquire in said water works property, franchises, ordinances and contracts."

Fourth. "That the Vicksburg Water Works Company gave the city notice in writing of the said purchase and assignment, with a written acceptance of the terms and provisions of the said ordinance."

Fifth. "That since the completion and acceptance of the said water works the city continuously received and used the water furnished by said water works, during a period of about fourteen years."

None of these questions present a Federal question, and every one of them was proved. In the pleadings, or argument of this case on the former appeal, the appellant now (appellee then) contended, among other things, 1st, that the city had no power to make an exclusive contract; 2nd, that the use of such expression did not prohibit the city from building a water works

of its own; 3rd, that the city had no power to make any such contract; 4th, that the Vicksburg Water Works Company did not acquire by said assignment or by the said proceedings before mentioned, the said contract; and finally, that no binding contract was entered into; to all of which the court made this response (Rec., 80, 81), which we insert here, even at the expense of repetition:

"It cannot be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of water works, and to contract with a party or parties to build and operate water works, and under the ordinance of the city of November 18, 1886, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years."

This court therefore after due consideration of the act of the Legislature and the ordinance, and necessarily all material principles of law involved, all of which were pressed by the defense upon the attention of the court, and which necessarily embraced the question of the exclusiveness of the contract, *so far as to prohibit the city from building water works in competition with this appellee*, and of the right of this complainant, the Vicksburg Water Works Company (denied most vigorously), to assert title to this contract, and of the power of the city to make the contract at all,

upheld the contention of complainant, and therefore settled the law of this cause, requiring the defendant to prove facts, if any, justifying the forfeiture of the contract, or to point out some inherent want of legal validity to the contract, and necessarily, of course, it must be some inherent want of legal validity not presented to or considered by the court on the former appeal. No other question is open.

The answer does not point to any *new* "inherent want of legal validity in the contract." The first proposition of law presented by the answer is contained on page 65, wherein it is pleaded "that no power was *even* conferred either directly—upon said mayor and aldermen whereby they were authorized to grant by contract, to any person or persons the *exclusive* (italics ours) privilege for any period of time to furnish and supply said city and its inhabitants with water. That said provision in said contract, is unauthorized, illegal and void."

This precise question was argued before this court, as we have shown, and the contract upheld,—as against the claim of the city to build and operate a water works of its own.

Second, the answer denied that the Vicksburg Water Works Company acquired title to the property and to the contract. This point was also concluded, we submit, by the former appeal; but on the hearing all the muniments of title under which the Vicksburg Water Works Company claimed were introduced in evidence.

Another defense sought to be introduced by the answer, is contained in the following averment:

"That by the 25th section of the charter of said city it is provided that the board of mayor and aldermen should not make any contract involving certain expenditures except upon advertisement for sealed proposals.

That by the letter and spirit of said provision the power to make any contract for a supply of water could only be exercised by said mayor and aldermen after an advertisement for bids for same and in pursuance of the bids. Yet respondents say that said mayor and aldermen did not advertise for bids for a contract to supply water, etc." (Rec., 68.)

This latter question, if not regarded as decided, was settled by the Supreme Court of Mississippi in the case of *Reid et al.* v. *Trowbridge et al.*, 78 Miss., 542.

These are the main legal propositions presented by said answer—some, if not all, of them previously argued at length before this court, and not one of them, we submit, possessing any merit.

Walla Walla v. *Walla Walla Water Company*, 172 U. S., 1, cited by this court in the former opinion, disposes of any questions relating to the exclusiveness of this contract, so far as the city's right to build its own water works is concerned. There are quite a number of averments in the answer, which the defendant made no effort to maintain by proof, several entirely impertinent and foreign to this discussion; for instance, such as the following:

"It has been the history of the corporations which have acquired and seized upon the public utilities that they have sought to evade as far as possible their liabilities and to incur the minimum of expense in the exercise of the public privileges possessed by them and have notoriously sought to press to the furthest limit their exaction from the public and their encroachment and monopoly of franchises, and the history of

said complainant in dealing with the city of Vicksburg is not an exception to the general rule." Rec., 70.)

Again:

"Respondents admit that on the 7th day of November a resolution was adopted by them as averred in the sixteenth paragraph of said bill; but they submit that it is a gratuitous assumption on the part of complainant to designate it in the several parts of said bill as 'a resolution and an ordinance.' It is to be known by its terms and its purport to be gathered from its face and its character and purpose cannot changed by any adroit appellation by which it may be designated." (Rec., 72.)

But the vital questions of fact (and there are only three), which relate to the character of the water ,the pressure upon the mains, and the rates, although productive of explosive epithets on the part of defendant, *were practically ignored by it when the cause came to be heard upon its merits.* It was alleged in the bill, as we have quoted, first, that the water furnished by the Water Works Company for a period of fourteen years "has at all times been and is now good and wholesome for public and private use and an adequate supply for the needs of said city and its inhabitants"; second, that "the pressure maintained has at all times been, and is now greater than required by said ordinance and contract." Certainly the material issues of interest to the city of Vicksburg and its inhabitants were the questions of wholesome water, and the pressure necessary to prevent the spread of conflagration. As far as the rates were concerned, they were fixed by contract, and if the contract was valid no inquiry relating thereto was pertinent. But the defendant, notwithstanding its unlicensed attack upon said rates,

failed to show that they were extortionate, and on the contrary the complainant established uncontradicted, that they were reasonable. The defendant in its answer (Rec., 69) raised the following issues:

First. "These respondents deny that the water which has been furnished by said water works company since they acquired the ownership thereof has been 'good wholesome water fit for all purposes of domestic or manufacturing purposes.' On the other hand they aver that said water has for the most part been charged with mud, sediment and other deleterious matter injurious to the health of the people who use the same and unfit for domestic use."

Second. "They deny the said Vicksburg Water Works Company has kept and maintained a pressure upon its mains to the extent stipulated and required in the contract with Samuel R. Bullock & Co. That for the failure of said company to comply with said contract in respect of the quality of the water to be furnished and in respect of the pressure required to be maintained upon said mains these respondents say that the complainant is not entitled to any relief by virtue of its terms; and that these respondents are released from its obligations." (Rec., 69, 70.)

Third. "They say that said alleged contract with Samuel R. Bullock & Co. imposes upon the inhabitants of Vicksburg and its corporate authorities an onerous and extortionate burden, that no such contract would now be made with the said Vicksburg Water Works Company or any other company at the rates prescribed in said ordinance, that they far exceed the average price charged for water in cities situated in like condition and circumstances to Vicksburg." (Rec., 70.)

In the bill filed by the city against this appellee in the Chancery Court of Warren County, a copy of which was made Exhibit "Y" to the original bill of complainant (Rec., 45 and 46), it avers:

"The Vicksburg Water Supply Company and the

Vicksburg Water Works Company have failed to provide for public and private use good and wholesome water.

That particularly since the 15th day of August, 1900, said Vicksburg Water Works Company have continuously from day to day and are now furnishing water which is not good or wholesome; that the water which has been provided from day to day by said company is wholy unfit for use and deleterious to health and that it is not even fit for ordinary bathing purposes."

This bill was sworn to, and the answer was sworn to, and if these allegations of the defendant had been proven, the complainant was *entitled to no relief whatever*, and should have been promptly deprived by the court of its contract. No corporation or individual accepting the obligation to provide for the wants of the public, should be permitted for one instant to evade such obligation, or by the imperfect discharge thereof menace the health and comfort of the public. The complainant promptly met these issues; in fact, propounded the allegations upon which these issues relating to purity of water and pressure were based in the bill of complaint, and proceeded to a trial thereof, —and what was the result? A few extracts will suffice:

Dr. Haralson, a medical practitioner for twenty-four years, stated in answer to Interrogatory 8 (Rec., 185):

"I consider the hydrant waterworks by far the most wholesome water used by my patrons in Vicksburg. My reason for so stating is because the diseases more commonly conveyed by drinking water are of more frequent occurrence among those of my patrons using cistern water than among those using hydrant waterworks water."

In answer to Interrogatory 9, he says:

"Since I have been in Vicksburg, covering a period of a little more than five years, I have never had a case of typhoid fever among those of my patrons who use hydrant waterworks water, but I have had fifty or more cases of typhoid fever during this time, among those of my patrons who use cistern water. According to this record, the hydrant waterworks water was as wholesome before as it has been since May, 1903."

And, in concluding his answer to Interrogatory 11, page 187, he says:

"We could not ask for better evidence that our water supply is not polluted than that we have not now nor have we ever had an epidemic of typhoid fever.

More than fifteen years of my professional life was spent in the eastern portion of the state, where the communities obtain their water supply from cisterns and wells. During that time I am sure that I treated from twenty-five to one hundred cases of typhoid fever annually. In one community that used well water exclusively, I had on hand at one time twenty-five cases of typhoid fever. Coming from that section to this, I was deeply impressed by the contrast and could attribute it to no other cause save the wholesomeness of Vicksburg's water supply."

Dr. Abraham L. Metz, professor of chemistry of the medical department of Tulane University, of Louisiana, and who had followed the profession of chemistry since his graduation in 1887, testified on page 200 of the record. He says:

"I have been connected with the medical department Tulane University of Louisiana since 1887, as follows: From 1887 to 1893, as demonstrator of pharmacy; from 1893 to 1896, as demonstrator of chemistry; from 1896 to date, as professor of chemistry; from 1889 to 1901, as chemist to the board of health, State of Louisiana, from 1889 to 1901, as chemist to the

board of health, City of New Orleans; from 1890 to date as official chemist, City of New Orleans.

During my connection with the health boards above mentioned, and as official chemist of the City of New Orleans, I have had frequent occasions to analyze water and water supplies in my official capacity.

I went to Vicksburg as an expert on water matters. I was in Vicksburg April 23, 1903."

He then goes on to testify about taking samples of the water, and furnishing an analysis of the water of the Vicksburg Water Works Company, giving references to scientific works, and on page 202 of the record, says:

"It is my opinion that the water taken at Vicksburg, April 23, 1903, will compare favorably with the most critical standards laid down by various authorities on water supplies."

In answer to Interrogatory 8, he says:

"I have made numerous examinations and analyses of the Mississippi river water, as furnished to the people of New Orleans. These analyses were made from various sources at different points on the river front, and from hydrants in different sections of the city. I have always found the water wholesome, except when contaminated by local conditions and sources."

In answer to Interrogatory 9 (Rec., 202):

"I know from personal observation with captains aboard ship, and from personal observation that preference is given Mississippi river water for use aboard ship. It is said that the water does not undergo the stage of putrefaction, which is common to other waters."

In answer to Interrogatory 11 (Rec., 202-203):

"I am acquainted with the writings of most of the recognized authorities on the subject of the wholesomeness of water."

And, after referring to several writers, he says:

"You wil note, however, the analyses of the Vicksbarg water, can be well judged by these very critical standards." (Rec., 203.)

Dr. Richard W. Jones, professor of chemistry of the University of the State of Mississippi 23 years; and also taught chemistry in two other colleges. He graduated from the University of Virginia, and had studied in other institutions in this country and somewhat in Europe, and had long experience in analyzing waters. He made an analysis of water for the Vicksburg Water Works Company, July, 1903. After furnishing an analysis of the water, he says (Rec., 210):

"This analysis shows that this water according to the highest and severest standards would be classed as 'pure and wholesome,' for drinking purposes."

It is to be noted in this connection that the testimony of Dr. Haralson and Dr. Metz related entirely to unfiltered water. The testimony of Dr. Jones related to filtered water, as the Water Works Company had voluntarily at a very heavy expense, upon its own volition, as shown by Mr. Crumpler, its manager, built a filtering system, as it thought it was proper to do, because the waters of the Yazoo river were turned into the Mississippi river by the government, and passing by the front of the City of Vicksburg, carried with them much of the excremental matter discharged by the city sewer, to which reference will be hereinafter made.

Jake Voeinkle, aged 64 years, engineer of the Vicksburg Fire Department; had been in the employ of the Fire Department of the City of Vicksburg for the past 35 years, with the exception of one year. On page 237 of the record, he says:

"I have both a cistern and hydrant at my home, and use both for drinking, although I usually drink the hydrant water. I ran on the river for a number of years as a steamboat engineer and never drank any other kind of water, and always found it wholesome."

He further says:

"I have also used Mississippi river water in the fire engines, and found no objection to it."

In answer to Interrogatory 8 (Rec., 238), he says:

"My experience and knowledge of this water is that there is no water more wholesome for drinking purposes, I have never found any water that is better. There is nothing better."

J. M. A. Brennan was asked (Rec., 233):

"If you have ever had occasion to use the Mississippi river water, state to what extent you have used such water, and from what point or points did you obtain said water?"

Answer (Rec., 242):

"Yes, at my residence, for drinking and cooking purposes, obtained from the water supply company."

Interrogatory 8 (Rec., 233):

"From your experience and knowledge what is the character of said water for wholesomeness and manufacturing purposes?"

Answer (Rec., 242):

"Good."

Mr. F. Strueby (Rec., 244), was general manager of the Lever Brothers' Oil Mills, Vicksburg, Miss., and had been using the water for ten years for manufacturing purposes, and had been taking said water from the Vicksburg Water Works Company, which delivered it to his mills from a system of pipes. His judgment is that it was good and wholesome water, and

the reputation of said water for wholesomeness was good.

E. S. Butts, president American National Bank (Rec., 248), testified in substance, that he had used the Mississippi river water in his home for baths, and for cooking, and obtained it from the hydrants of the Vicksburg Water Works Company; that said water had always been recommended as being wholesome, and that he had found it satisfactory for his bath and kitchen purposes. The sanitary condition of Vicksburg would compare favorably with any other of these towns and villages. "The health is very good, and is as good since the construction of the water works as it ever was before."

Charles Linstrom, master machanic of the Yazoo & Mississippi Valley Railroad (Rec., 254), testified in substance that he had been in the habit of drinking water at the shops and cistern water at home, but "I now also use the water works water at home, since I moved in my new house;" that he uses it at his home for domestic purposes, and at the railway shops for drinking and for making steam in the boilers. In answer to Interrogatory 7, he says:

"The majority of these people who know anything about the matter and have used it say that Mississippi river, say that it is the purest and most healthy water to be had."

In answer to Interrogatory 8:

"My experience has been that as far as wholesomeness is concerned, it is all right. It is good water for making steam."

In answer to Interrogatory 9:

"From what I know of the matter, I think that the City of Vicksburg is equally as healthy as any city

in the State of Mississippi or of Louisiana. I think it is as healthy now as before the waterworks plant was constructed."

D. H. Herman, proprietor of the garden restaurant, after testifying to the wholesomeness of the water says (Rec., 257):

"I would prefer the Mississippi river water as I am getting it now, better than any other water that I know of. I would sooner drink it than any other water that I can get."

With this evidence confronting it, after all of its reckless charges concerning the impurity of this water which we have hereinbefore quoted, what did the defendant do? Did it introduce a single witness to controvert these allegations? Did it offer any testimony whatever to support its own sworn allegations? Did it offer anything upon the only issue, except that of pressure and rates, on the merits, to support the burden it had to sustain? We look in vain in the record for a paragraph, a sentence, a line, a word, a syllable of testimony of this kind; and the defendant stands convicted before the court of making accusations, which, if they had been true, as stated, would have warranted a decree against the complainant. Not only this; but after all these years of vigorous contention, with delay after delay intervening, when the defendant is finally pinned to a trial and there is no longer an escape from a hearing of the issues, it invoked, it surrenders without a struggle; seeking relief only upon such petty grounds as a failure to permit an amendment, to grant a continuance, and other contentions, none of them reaching the heart of the controversy.

Pressure.

The other issue *upon the merits* relates to the pressure; and after the city for 14 years had found no cause of complaint against the water works company by reason of any alleged failure of pressure, it certainly seems to be incumbent upon the defendant to introduce some proof to show that the pressure was insufficient. Section 11 of the contract provides as follows (pages 19 and 20 of the record):

"Section 11. After the works are put in operation, if at any time the pressure gauges located at the points hereinbefore named shall indicate a pressure of less than twenty (20) pounds on the distributing mains at the highest point of elevation for the period of two weeks in succession then the rental for the use and employment of the hydrants for the purposes aforesaid shall cease until the standard of pressure in this section provided shall be attained, provided, however, if the pressure indicated as aforesaid, shall be less than twenty pounds for two calendar months in succession then all the rights and privileges of the said Samuel R. Bullock & Company, their associates, successors and assigns, acquired by virtue of this ordinance shall at the option of said board of mayor and aldermen made in writing cease, determine and be null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock & Company, their associates, successors and assigns from temporarily shutting off the water from its said system or any portion thereof for the purpose of making repairs or extensions to the same; and no liability shall attach to the said Samuel R. Bullock & Company, their associates, successors and assigns for the suspension of the supply of water provided the repairs or extensions are made and the water turned on again without unnecessary delay. But the city shall not be liable to pay the rental for any hydrant during such time as the proper supply of water cannot be procured therefrom."

This is an explicit contract, easily understood, and if there was any objection on the part of the city by reason of pressure, that objection, by the very terms of its own solemn obligation, was required to be *in writing*, and there is nothing in the record to show that the city ever made any such objection. But independently of this proposition, Mr. Crumpler, the manager of the Water Works Company, filed certain charts as Exhibit "E" to his deposition. They were so many in number that, upon the application of the appellant, it was excused from having the same copied into the record, and the originals have been transmitted to this court. These charts show that at no time was the pressure below the stipulated minimum figure, to wit, twenty pounds, for a full period of two weeks; and, on the contrary, the testimony of Mr. Crumpler shows, that the representative of the city fire department did not or would not always open the hydrants far enough to get the full pressure from them when there was a fire.

RATES.

The remaining question upon the merits (which, from the fact that the contract provides for compensation or rates to be charged for the use of water, did not require complainant to introduce proof), yet in view of the charges that the appellant had made, that such rates were unjust and extortionate, it was to be expected that it, would on the hearing of the case, supplement the charges with *some evidence*, if such evidence was procurable. The fact that the defendant *permitted such a momentous issue, raised by itself, to*

go by default, denies it the right to be heard upon that subject here. But the appellee is not without proof on that subject, although such proof was not necessary for the determination of its case. Mr. Crumpler, whose testimony on this subject was unchallenged, although he had been asked two hundred and forty questions on cross-examination, testified (Rec., 268):

"The hydrant rentals and rates named in the contract between the city and the water works company, and regulations as per Exhibit "H," a part of this deposition, are reasonable, and I have examined the city records to ascertain if there were any minutes, resolutions or ordinances of any kind, complaining of or notifying the water company or any of its predecessors, that the contract between the city and S. R. Bullock & Company was not being complied with in any particular, prior to November 7, 1900, and I find there is none; and the city clerk also tells me that there is nothing prior to that time."

Exhibit "H" appears on pages 304 to 305 of the record.

It is to be noted that no objection was made to any of the testimony on the part of the appellant, so far as this record indicates.

Thus, we have shown that the propositions of fact containing merit, which would justify an application to the chancery court, to wit, the wholesomeness of the water, the rate of pressure, and the reasonableness of the rate,—are all issues wherein the evidence is overwhelmingly in favor of the appellee. All the material principles of law presented by the answer, as we have shown, are embraced in the conclusion reached by this court on the former appeal, and none of them present any federal question in addition to the one heretofore decided.

We therefore submit this case should be dismissed for want of jurisdiction.

SEVENTH AND LAST ASSIGNMENT OF ERROR.

There is another assignment of error, to which we have not yet referred, and, of course, if this court is without jurisdiction, as we contend, it is not necessary to give it consideration, but for the purpose of having *all matters* which the defendant has presented by its assignment of errors before the court, we will now discuss the proposition raised in the seventh and final assignment which is as follows:

"7th. The court erred in grating a mandatory injunction against respondent commanding respondent within one year to build and construct a sewer whereby the sewer now existing on Washington street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi river south of the intake of complainant."

For this purpose it may be proper to make further extracts from the record.

The original bill charges, among other things (Rec., 8), that a large underground gutter had been constructed by the City of Vicksburg in 1870, for the purpose of conducting surface water into the Mississippi river, and that,

"Some time after the Vicksburg Water Supply Company was put in operation, the citizens and inhabitants of defendant along or near Washington street began to connect the water closets on their residences, hotels and stores with this gutter through the acquiescence and consent of defendant, to that extent until it has been converted into a partial sewer for said street for said water closets of said residences, stores and hotels, and if defendant permits a general connection with

this gutter for such purposes the sewerage thereof will pollute the waters of said river to that extent so as to make it unfit for domestic and drinking purposes as provided by said contract and ordinance with said city, and unless the use thereof is prohibited by defendant, your orator will be compelled to cut off and prevent the use of its water for such closet and sewer purposes by said residences, hotels and stores, in order that good and wholesome water may be delivered to said city and its inhabitants as is being now delivered."

This original bill was filed as stated, on the 16th day of February, 1901, and among its prayers was one for a decree "requiring and compelling them not to permit the inhabitants along Washington street of said city from using said gutter or culvert as a sewer." (Rec., 12.)

On September 22, 1902, as shown by the testimony of Mr. Crumpler (Rec., 219 and 220), the appellee addressed a communication to the appellant, in which, among other things, it says:

"We most respectfully, but earnestly call your attention to the dangerous condition that now partially exists, and which will wholly exist as soon as the contemplated canal is fully completed and the Yazoo river is flowing directly in front of the city, which we presume will be the case after the next thirty foot rise in the Mississippi river, and is likely to come at any time, and almost certain to come not later than ninety days.

We refer to the sewage excremental matter that is being discharged from the culvert at the foot of Washington street, just north of the Y. & M. V. passenger depot. This culvert was originally built for surface drainage only, but has been turned into a sewer for stores, hotels and other buildings along Washington street for a distance of about eight blocks. There have been also sewer mains laid along Veto, South, Crawford, Clay, China, Grove, Jackson and Main streets connecting with this culvert; residences and other

buildings along these streets are connected or being connected daily with these sewer mains, so that the entire sewerage outlet of the city is at the foot of Washington street, as above stated, thus attempting to make a complete sewerage system in the most thickly populated portion of the city.

We think it also proper to state that all these connections have either been made by your direct authority, or by your formal acquiescence. We especially call your attention to the further fact that the outlet of this excremental matter is at a point above where the intake pipes of the city water works are located, and therefore, partially pollutes the water, not during high water, at the intake pipes of the Mississippi river, but as soon as the canal is open and the Yazoo river is allowed to flow directly in front of the city the pollution of the water at that point by this excremental matter will be continuous every day and every hour, thereby contaminating the waters at the intake pipes of the city water works, located about one mile from the sewerage outlet making it unfit for use, and thus producing typhoid fever and impairing the health of the city, and causing the patrons of the city to stop the use of the water and entailing great loss upon us.

You will undoubtedly recall that when the pumping station of the water works was located, neither this culvert, nor any of the connections was then used as a sewer, and that it has only been used for sewer purposes within the last few years, a use which has been sanctioned by you.

A bill was filed as you are aware, in the United States Court by this company praying, among other things, for a decree directing your honorable body to stop the use of this culvert for sewerage purposes, but notwithstanding the pendence of this litigation you have continued to permit it and authorize this sewerage connection, and on this very day there are sewer mains being laid to or connected with this culvert by your authority or consent, and if this practice is not discontinued this company will be irreparably injured."

And the communication concludes with the following respectful address:

"We respectfully request your honorable body to remedy the condition to which we allude without compelling us to apply for an injunction to obtain relief. We also respectfully notify you that unless your honorable body prevents this culvert being used for sewerage purposes, and thus remove this constant menace to the health of the people, the city will necessarily be held liable for any and all damages and expenses the water company may sustain, or be put to, as you are already responsible for permiting this condition of affairs to exist.

We respectfully request that you take immediate measures to remove this great cause of complaint."

This communication, as shown by the testimony of Mr. Crumpler (Rec., 218), was delivered to the board of mayor and aldermen. He says:

"The water company has personally, together with its attorneys, gone before the board of mayor and aldermen about two months ago (this testimony was taken on the 20th day of November, 1902), with a written petition requesting them to quit the use of said culvert for water closet connections, but like similar complaints, it seems to have fallen on barren ground."

Thus the court will perceive that at the inception of this litigation, complaint was made about this sewer, and early in the history of the proceedings a pacific, amicable and courteous attempt was made to induce the city to take steps to remedy a condition of affairs, which was becoming intolerable and which was a grave menace to the health and happiness of the people of Vicksburg. To this polite appeal no attention was paid, and in fact, the defendant, in none of its testimony, made an effort to disprove the allegations of the bill in this respect, and so little concerned was

the appellant about a matter so fraught with disaster to thousands of people that it even failed or declined to cross-examine the witnesses introduced by complainant to sustain this allegation.

Mr. J. B. Smith, who was a plumber and had been engaged in that business for eighteen years, testified (Rec., 221) that the sewer had been built for the drainage of surface water, but it was now used to drain surface, water, water closets, urinals and sinks. In answer to interrogatory No. 7, he says (Rec., 221):

"I think there are between three and four hundred water closets and urinals connected with this sewer at present."

In answer to interrogatory No. 9, he says:

"I know of a great many put in by consent of the board of mayor and aldermen of Vicksburg."

In answer to interrogatory No. 10, he says:

"It is my opinion that the use of this underground gutter along the most populous street of the city is a menace to the health of the city, and the sewerage thus discharged flows down past the intake pipes of the city water works and pollutes the supply furnished the city."

Mr. William Stanton, an architect, and a resident of Vicksburg, testified that Stanton & Company, the firm of which he was a member, constructed the sewer for the city of Vicksburg, and that "the purpose for which the underground gutter along Washington street was originally constructed was to carry off the surface water caused by rains in their descent down the hill cut the streets west of Washington street very badly, and also for the purpose of draining the basements of the buildings on the east side of Washington street, and it fully performed this duty." (Rec., 220, 221.)

A. L. Pierce testified that he was a civil engineer for the city of Vicksburg in the years 1870 and 1871, and that he supervised the construction of the gutter. He says (Rec., 222):

"This underground gutter was built for the purpose of surface drainage, and constructed in 1871 as near as I can remember, by the firm of Stanton & McKenna."

In answer to interrogatory 8, he says (Rec., 222):

"The discharge of the excremental matter into the water so near the intake pipes of the water works is endangering the health of the city."

He testified on the 20th day of November, 1902. (Rec., 222.)

Mr. M. O. Crumpler testified on the 20th day of November, 1902, and his testimony is in substance as follows:

"The sewer was originally constructed for the purpose of carrying off surface water," and "is now used for water closet and urinal connections for the purpose of carrying off excremental matter, and for carrying off surface." "There has been, and now is, sewer mains laid along other streets which have their connections and outlet into the sewer on Washington street. These streets are, Veto, South, Crawford, Clay, China, Grove, Jackson and Main, each of which have a sewer main laid along them and all connected with Washington street sewer."

"The residences, stores and other premises on these streets have their water closets connected with thse sewers and use them daily, all of which have their outlet into the sewer on Washington street, above described. (Rec., 217.)

In answer to interrogatory 10 he says (Rec., 217):

"I know it to be a fact that the excremental matter discharged from these sewers which is near the intake pipes of the city water works will pollute the

water so as to produce typhoid fever and other fatal diseases. In other cities where a similar condition, as to the sewer outlet and intake pipes of the city water works exist, it has produced typhoid fever and other diseases to an alarming extent."

In answer to interrogatory 11 he says (Rec., 217):

"Yes, our company has protested again and again against the use of said culvert for sewerage purposes, that is, for such purpose as it has recently been put to, such as water closet connections, etc."

On page 218 of the record, he testified, in answer to interrogatory No. 12:

"The population of Vicksburg and its suburbs is about 22,000. We are supplying about seven thousand five hundred people with water. Very near the entire business of the city is done on Washington street, and its immediate section. I think there are about nine or ten thousand people living and doing business on Washington street and its immediate section. All the big hotels, office buildings, stores and other public buildings, such as the custom house, and postoffice buildings, and most all stores, restaurants, saloons, etc., on Washington street and immediate section have their water closets connected either directly or indirectly with the sewer along Washington street and the lateral sewers connected therewith."

In answer to interrogatory 13, he says, among other things:

"I attach a map to my interrogatories and mark it Exhibit "B" and make same part of my answer, which shows the sewer on Washington street, together with the lateral sewers connected therewith, and the outlet of same and the city water works intake pipes, showing their relative position." (Rec., 218.)

This exhibit is missing from the record, as certified to by the clerk, as we will hereinafter show.

In answer to interrogatory No. 14 he says:

"Yes, I know that the city council have passed resolutions authorizing permitting or generally acquiescing in sewer mains being laid and water closets being connected therewith, all of which have their outlet at place designated on map Exhibit "B."

And finally, in answer to the last interrogatory, No. 15 (Rec., 218, 219), he says:

"The city water works were built in 1887, and the pumping station and intake pipes were located on the Mississippi river at which point it gets its supply of water for city and domestic purposes and that it has continued to get water from said place up to the present time and is doing so now. When the city water works located its pumping plant below said outlet of sewer, the sewer was used for surface drainage only, and no water closet was then connected with the sewer, and was not until within the last few years. The condition continues to get worse by the continued daily connections of water closets in the most thickly populated part of the city, as well as other parts of the city. The health of the city is impaired by this condition of affairs, and besides this condition will ruin the city water works in this, it will cause the patrons to stop the use of the water and will throw the company in bankruptcy. The city council has also within the last twelve months or such a matter, made or caused to be made the entire dumpage from the scavenger carts of the city just below the outlet of this sewer. The dumpage consists of matter gathered up by the scavenger carts over the city consisting of all waste and rotten matter, such as rotten cabbage, potatoes, bananas, apples, peaches, grapes and all other rotten vegetables and fruits, such as is usually put into slop barrels. Also all small dead animals, such as cats, dogs, rats, etc., all of which contaminates and pollutes the water at the intake pipe of the city water works from this place of dumpage."

This appalling situation of affairs, thus disclosed by the uncontroverted testimony, existed on the 20th

day of November, 1902. The appellant, apparently perfectly indifferent to these disclosures made no serious attempt whatever to defend its action, and in May, 1904, when this final decree was rendered, had still made no effort to remove this source of danger from the streets of Vicksburg. It had thus turned a deaf ear to the appeal of the water works company, and that company, without any obligation imposed upon it by its contract, voluntarily assumed to relieve the people from danger so far as it could, by the erection of a costly filtering plant.

Upon this subject Mr. Crumpler testified February 29, 1904 (Rec., 267):

"The water company has made recent improvements on its plant. One of the greatest improvement—the construction of a complete filter plant to filter all of the water delivered to the city, costing about thirty thousand dollars. The reason we had to put in the filter plant was on account of the sewerage discharge polluting the water a short distance about (above) our intake pipe, as stated in my previous deposition on the sewerage outlet from the city, which the city has recently put into operation; and the further reason that the United States government has recently changed the course of the Yazoo river, causing it to flow in front of the city of Vicksburg, Mississippi, thereby taking all of the city garbage dumps and sewerage discharges directly in front of our intake pipes, which is fully set in my former deposition on the sewerage question."

But notwithstanding this fact, the attacks of the city upon it did not cease. Persistent effort seemed to have been made to destroy the integrity of the contract and to delay the payment of compensation while still using the water furnished under the contract. It had also hampered this complainant with litigation in

the state court, as disclosed by the record. It had appealed to the legislature for power to build water works, and held an election to acquire money for that purpose. It had solemnly repudiated its obligations in November, 1900, and it was impeding and assailing this appellee time and time again in the orderly pursuit of its business, as shown by this record, and yet it never made a single attempt, however puerile, to protect the health of its inhabitants from the danger caused by allowing this underground drain, constructed as a conduit for the passage of the pure rain water, to be converted into a deadly instrument whereby the health of every inhabitant of Vicksburg using said water was assailed.

When the court met in May, 1904, over seventeen months after this testimony of Smith, Stanton, and others was taken, it was apparent that the appellant had made no effort to protect its people from this constant menace to their prosperity and health, so far as anything in this record is concerned; and while the health of its inhabitants were threatened by its own act, it was propounding questions of law, which if effective would defeat any right of recovery on the part of this complainant. While the city was pleading the invalidity of the "exclusive" feature of the contrat, the excremental matter of three or four hundred water closets and urinals, according to the testimony of Mr. Smith, was being discharged into this underground swer, carrying with it the possibility of disease and death. No apology was offered for this condition of affairs, and yet it was a matter which necessarily the court had to deal with. The record does not show that appellant made any offer to disconnect these water

closets and urinals from the sewer, or to discontinue the use of the sewer; or to defend such use. It was a serious question then what would happen to the people of the city, if all these water closets and urinals, serving the needs of thousands of people, should be suddenly disconnected from their outlets, and all the deadly matter contained in these cess-pools remain stagnant therein, and with all their foul and noisome airs reaching the surface unconfined, and perhaps carrying into many households the germs of deadly infection. It is a serious matter to determine how far an entire people should be charged with the extraordinary expense of building new cess-pools and sinks and closets and drains with no proper outlet provided by the city for any excremental matter therein to be contained. A grave question is presented by the proposition whether these people could have built under such circumstances new water closets or cess-pools which would serve their purpose, and not be detrimental to the public health. A large hotel, for instance, with hundreds of rooms and several hundred guests, with no ground convenient for the erection of cess-pools, with no means available for the conveyance of excremental matter, would find great difficulty in successfully meeting the emergency. All these and kindred questions would necessarily engage the attention of the court. It was the desire of the water works company to deal fairly and leniently with its customers, to impose upon them no unnecessary hardship and expense, to subject them to no inconvenience that could be avoided, and besides these patrons were not before the court.

The learned judge had to deal only with the parties subject to his jurisdiction, and the sole offender was the appellant, who had licensed these outrages against the public health. What decree was he to render that would be just and fair to the inhabitants of the city of Vicksburg, the rich and poor alike, and proper under the circumstances? We submit the court below reached the only conclusion consistent with right and justice and equity. It was not the purpose of the appellee to destroy valuable privileges already granted by the city and to invoke by the stroke of the pen a decree fraught with hardship, if not financial disaster, to hundreds of people. It therefore did not ask the court to require all the good citizens of Vicksburg who had been depending on this sewer as a vehicle for the conveyance of the poisonous excrement from their premises to discontinue its use, by decreeing that the consent theretofore given and which consent was producing the damage, be withdrawn, but did ask the court to prevent any further connection for the conveyance of sewage or excremental matter, so that the public would be warned and those intending to build would be notified that they could not depend upon this sewer as a means of relief. But what was to be done with the culvert or sewer into which the contents of three or four hundred cess-pools and water closets and urinals were daily discharged and thence transported to the waters in front of the city, thence to become by a break down of the filtering plant, a threatened source of continuous injury to the weal of the city. These inhabitants of Vicksburg had come to rely upon this sewer; they had made their arrangements accordingly, and were not to blame for act-

ing under the sanction of the municipal authorities. Why should they be punished when the real offender stood in court and amenable to its process? Therefore the court in effect says,—"Having permitted your sewer to be diverted from its original purposes, having authorized hundreds of connections from sinks, cess-pools and closets, having made this underground culvert a sewer to all practical intents and purposes; and sanctioned it by years of use, over the protest and against the prayers of the complainant, you will be made to repair the injury you have done, so far as it can be repaired; you will be made, so far as the power of the court can be invoked, to give some heed to sanitary needs; you will be compelled to undo the wrong that you have done, without detriment to others, and having created a nuisance deliberately and in the face of the strenuous protest of this complainant, you must do what you can to abate this nuisance." As the only proper solution of a distressing problem, was not to destroy existing connections, which we have shown would have been fraught with injury to the innocent, not to discard the sewer, the use of which had already been licensed for this purpose, but to make the sewer effective to carry away the deadly matter after the city had authorized it to be discharged into the sewer, and the court in effect said, as the decree declares, "you must so construct an outlet to this sewer or culvert that the matter which you have authorized to flow therein shall pass beyond the zone of infection and be discharged below the intake pipe of complainant."

The exhibit filed in this cause and which is missing, undertook to show the said "sewer with the lateral sew-

ers connected therewith, and the outlet of same and the city water works intake pipe with their relative positions." With this exhibit before the court, in view of the alarming situation, imperative action was required, and the only proper solution, we submit, was to require the appellant, as we have stated, to repair the wrong it had committed, as far as it could do so. It seems more reasonable and less expensive to require the city to *create a proper outlet for its sewer* than to demand that the city should assume the responsibility and cost of destroying the sewer and the probable damage suits resulting from such action. It seems more reasonable and less expensive to require the city to find a method of discharging the excremental matter at its own charge, than to entail upon this appellee the duty of filtering the water to keep such matter from contaminating its water supply, or to impose upon the innocent unoffending citizens of Vicksburg who had connected with said sewer in good faith and with the municipal consent, the unjust and doubtless burdensome outlay of providing additional and different outlets for their water closets and sinks and drains.

But the court introduced even into the decree a saving clause, and expressly provided:

"That if the defendant is unable to construct or extend said sewer or culvert and construct said culvert within twelve months from this date, it can apply to this court for good cause shown for an extension of time beyond the said period of twelve months."

If the city was without means to construct, and could so show to the court, under the order, as we construe it, an extension of time would necessarily

have been granted, and under such circumstances, there would be practically no limit to this extension of time.

If the question of cost is to be pressed for consideration, the same argument could be made if the city should be required to destroy the sewer, for that would require an outlay of money. After the city had authorized these connections, and the parties who made the connections had refused to comply with the order of the city directing them to discontinue such connections, whose duty would it be to disconnect? It might be the appellant would be liable for damages, but surely it would be its duty to assume the expense of closing the conduits or means of access to the sewerage system. These acts would require money; would be a source of expense to the city; yet we cannot think it would be doubted that the power existed in the court to compel the city to close these apertures unlawfully authorized. It seems more reasonable and more in consonance with the principles of equity to require the city simply to extend a drain which it had created and made a sewer by positive acts, beyond a point where no injury could result to the water works company or the inhabitants of the city. We submit a question is presented where the city had undertaken to build a sewer to a certain given point, and that point became a source of danger to the health of the people and the property of the water works company. Having built the sewer to that point, what objection can there be to requiring it to extend it to a point of safety? Suppose the city of Vicksburg had concentrated all the surface water pouring into the streets of Vicksburg into a single channel and per-

mitted the contents of that channel to pour unobstructed upon the residential property of one of the citizens, is the power of the court limited in a case like that to an injunction that the city close that outlet, rendering all the valuable work that it had done to procure such outlet for its surface water valueless,—in other words, to overthrow the entire surface water system of the city, when by a mere extension of the outlet in another direction the property of the residents would not be touched and no damage done? The power of the court to issue a prohibitory injunction in cases of that sort cannot be questioned. Why should it have less power when a mandatory injunction is invoked? What the court is called upon to do is substantial justice, to use its remedial powers so to avoid needless injury and to do equity. We do not think the question of the ability of the city to construct said outlet is now involved, but if it could be shown that the city had not the means to build the culvert and stop the nuisance, it would be no worse off than any other insolvent debtor against whom a writ of execution has been issued and upon which a *nulla bona* return had been inscribed. If the city has not the means to build this culvert, let it say so at the proper time; the question now is the power of the court to issue such an injunction. It was the only proper course for the court to pursue under the circumstances consistent with the best interests of the greatest number. We will refer to some of the cases we regard as pertinent in this connection, but submit that the question we are now considering is one for the Circuit Court of Appeals to decide and not this court.

In a proper case the power of the chancery court to issue a mandatory injunction must now be conceded. Mr. Gould in his work on Waters, section 552, says:

"The power to issue a mandatory injunction was formerly doubted; and resort was had to prohibitory circumlocutions. Thus Lord Eldon refused to order repairs to be made to a canal, but granted an injunction restraining the defendant from impeding the use of the canal by continuing to keep it or its works out of repair. Where the injunction requires a positive act on the part of the defendant, it is called a mandatory injunction, although expressed in negative terms. But the power to issue a mandatory injunction is completely established, and has been frequently exercised in cases affecting waters."

Section 553:

"Where the wrongful diversion of water has been completed before the filing of the bill, equity will compel the restoration of the stream to its natural channel by a mandatory injunction. And where defendants, in relieving their lands from surface-water, deepened a ditch upon the highway, and thus caused an increased and unnatural flow of water through the surface-drains of adjacent owners, causing injury to their lands, and making further injuries probable, a mandatory injunction was issued directing the defendants to fill up the ditch."

This court in *Missouri* v. *Illinois and The Sanitary District of Chicago*, 180 U. S., 208, reaffirming the doctrine announced in *Mugler* v. *Kansas*, 123 U. S., 623, 673, said (p. 244):

"The grounds of this jurisdiction, in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and by perpetual injunction protect the

public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

In that case "the object of the bill was to subject this public work (an artificial channel or drain) to judicial supervision, upon the allegation that the method of its constructions and maintenance will create a continuing nuisance, dangerous to the health of a neighboring state and its inhabitants, and the bill charged that the acts of the defendants, if not restrained, would result in the transportation, by artificial means, and through an unnatural channel, of large quantities of undefected sewage daily, and of accumulated deposits in the harbor of Chicago, and in the bed of the Illinois river, which will poison the water supply of the inhabitants of Missouri, and injuriously affect that portion of the bed or soil of the Mississippi river which lies within its territory." The bill was demurred to and the demurrer was overruled.

This was a suit brought by the State of Missouri against the State of Illinois and the Sanitary District of Chicago asking this court to restrain or abate practically, a nuisance, and this court unhesitatingly assumed jurisdiction.

"City's right to make drains does not indicate the right to create a nuisance, public or private."

Rose's Digest, U. S. S. C. R., 1757.

Citing

Richardson v. *Boston,* 19 How., 270.

Even, as to the District of Columbia, it has been held, that "the adoption of sewer system being a quasi-judicial act, is not reviewable in a private action for damages, but the construction and repair of sewers being ministerial, the city is liable for damages resulting from negligence therein."

Rose's Digest, *Ib.*

Citing:

Johnson v. *District of Columbia*, 118 U. S., 22.

"A municipality may not empty its sewers upon private property, without acquiring the right to do so."

"Where a municipal corporation discharges or threatens to discharge sewage from the outlet of a permanent sewer directly upon private lands without having acquired the right so to do, the owner is entitled to the judgment of a court of equity restraining the injury committed or threatened; and he is not confined to a recovery of his damages in an action of trespass."

New York Central & Hudson River R. R. Co. v. *Rochester*, 127 N. Y., 591.

"Plaintiff owned and occupied certain premises, across which ran a stream fed by springs of pure water. He collected the water of said stream into an artificial basin and used it for domestic purposes and the propagation of fish, and in winter procured from it a supply of ice. Defendant thereafter constructed sewers, through which, not only surface-water, but the sewage from houses and water closets was discharged into said stream above plaintiff's land, rendering its water unfit for use and covering its banks with filthy and unwholesome sediment. Held, that these acts constituted a nuisance, to restrain which, as well as to recover his personal damages, plaintiff could maintain an action."

"One entitled to the use of air or water in its nat-

ural condition, and who is injured by its pollution, may maintain an action against the party causing it, whether an individual or a corporation."

Chapman v. *City of Rochester*, 110 N. Y., 273.

"Equity will interpose, by mandatory injunction, to compel the restoration of running water to its natural channel, when wrongfully diverted therefrom, at the suit of the party whose lands include either the whole or a part of such channel."

Corning et al. v. *The Troy Iron and Nail Factory*, 40 N. Y., 191.

"It is the law that if a municipal corporation by its system of constructing sewers renders an outlet necessary, it must provide one."

Citing:

City of Evansville v. *Decker*, 84 Ind., 325.
City of Crawfordsville v. *Bond*, 96 Ind., 236.
Van Pelt v. *City of Davenport*, 42 Ia., 308.
Byrnes v. *City of Cohoes*, 67 N. Y., 204.
City of Fort Wayne v. *Coombs, et al.*, 107 Ind., 75.

An interesting case, showing the extent to which relief will be granted in a court of chancery where the facts justify it, is *City of Llano* v. *Llano County* (Court of Civil Appeals of Texas, Nov. 10, 1893), 23 S. W. R., 1008. This was an action "by the City of Llano against the County of Llano to abate and remove the county jail and the cesspool in connection therewith from the public square of the City of Lllano, they being an obstruction on said public square in the nature of a purpresture and public nuisance; and also an abatement of the cesspool as a nuisance, resulting from its improper

construction, whereby noxious gases arising from human faeces deposited therein are dangerous and deleterious to the public health of the citizens of said city. The court below sustained a general demurrer to the petition, and also a special demurrer to the effect that it does not appear that the City of Llano has 'such an interest in the subject-matter of said suit as would entitle it to any relief.' The City of Llano declining to amend, its suit was dismissed." The court found no difficulty in maintaining that the city, as the representative of the public, had the right to bring the suit, also in applying the general law of nuisances when disposing of the case on its merits, notwithstanding the defendant was a county, and thus a governmental agency. The court said (p. 1012):

"The fact that the county may use the square in part for its jail building, and it being of a public or quasi public use, will not excuse it from the application of these general rules, unless such jail is a use that is permitted by the terms of the dedication. If this square can be used by the county for its jail building, and this be justified upon the ground that it is a public use,—or, in other words, a use by the public,—it or the city, for the same reason, could use and appropriate the entire square to sites for the erection of such public buildings as they may be by law authorized to erect. The statement of such a proposition is an argument that defeats it. Clearly, the county or the city would have no such right. * * * And it makes no difference that the obstruction may not practically interfere with the use by the public; if it in fact is an obstruction and encroachment that is not in keeping with the use for which the property was dedicated, it is a purpresture, and a nuisance, and as such is abatable."

After citing a number of cases, the court again says (p. 1012):

"Such obstructions and encroachments upon the highways that are permanent in character are in law regarded as purprestures and public nuisances *per se*."

"The facts stated in the petition, if true, show that the use of the public square for the jail and cesspool was unauthorized, and that they are encroachments and obstructions upon said square in the nature of purprestures and public nuisances."

If, therefore, a county, with its limited powers, can be compelled to remove cesspools and jails, which necessarily involves large outlays of money and a great destruction in the value of public property, why should not this city be compelled to abate a nusiance which endangers to a greater extent the public health than the mere erection of a cesspoll on a public square, or the mere building of a jail on a public square, or its use of a sewer so regulated by the court as to prevent irreparable injury to the appellant? We submit that where the city undertakes to maintain a sewer and thereby creates a private or a public nuisance, the city acts then, not in a legislative or governmental, but in a ministerial capacity, and is within the reach of the court.

Mr. Wood in his work on Nuisances, says (page 1032):

"As to the *necessity for a sewer, or its location, or the system or plan of sewerage*, the decision of the proper municipal in conclusive, because it is an exercise of a discretion reposed in them by the law, and consequently is not revisable by the courts; but if, in the selection of a location, it unnecessarily creates a nuisance to public or private rights, it is responsible therefor; or, if it improperly exercise any ministerial power incident thereto."

On page 1033, he says:

"A municipal corporation is liable for damages resulting from defective plans for drainage where the construction and maintenance of improper drainage, in accordance with the plans, creates a nuisance and obstructs private or public ways in which the property owner has a special interest."

And on page 1035:

"The rule is, that while the duties which are imposed upon a municipal corporation in respect to acts for the benefit of the public are purely judicial, and are exercised properly, and with proper care, no liability attaches for the consequences resulting therefrom, yet for the exercise of purely ministerial duties, or the exercise of judicial functions improperly or negligently, it is liable."

The principles of law and equity must always be adaptable to the ever expanding needs of society.—The courts do not remain dormant while civilization advances. Their remedial processes should be responsive to the exigent demands of a progressive era. The idea we wish to convey is fitly expressed in the following quotation from the elaborate opinion of the Circuit Court of the Northern District of Alabama, S. D. (*Kessler et al. v. Eudery Co. et al.*, 129 Fed. Rep., 397, decided April 15, 1904).

"Less than 50 years ago the Supreme Court of this state held that the owners of a steamboat, whose crew willufllv ran down and sank a flatboat, were not responsible for the wrong. It held, likewise, a corporation could not commit a libel, or be guilty of malicious prosecution. In applying the doctrine of *ultra vires*, it held that a charitable corporation which loaned out its funds for investment could not recover the money under the contract or in an action for money had and received. These rulings largely represented the doctrine prevailing in those days. What court would now

think of measuring the rights and liabilities of corporations in that regard by the old decisions? Courts of law and equity have constantly expanded or contracted the application of old and general principles to meet the exigencies of modern corporate development, and in properly adjusting the changed rights and relations born of new conditions. 'The sound administration of justice' will be best promoted by equity's so molding its decrees in cases of this kind as not, on the one hand, to give such effect to merely technical consideration of the nature of the artificial person called the corporation, as will improperly hamper the conduct of its business; nor, on the other hand, to enable the governing body to oppress or injure creditors or stockholders who are, in equity, the real owners of the corporate property. Pomeroy's Eq., § 111."

It is undoubted that the city has created a nuisance; that, notwithstanding the protest, objection and pleadings of this defendant, it has maintained and continued to maintain in the face of the pending bill a condition of affairs which would probably not be tolerated, for an instant if it had resulted from the action of a private individual. It must be conceded that, under proper circumstances a mandatory injunction will lie; it must be conceded that the city in this case could be enjoined from further pollution of the water supply; it must be conceded in this case that the court could have directed an abatement of the nuisance,—all of which would impose heavy expenses upon the city. Why, then should this ruling be regarded as an abuse of power in the court, the appellant before it in its ministerial capacity, confessedly a trespasser? It adopted the easiest method of solving the difficulty, and simply required the appellant to do what the Supreme Court of Indiana held it must do when it has constructed a sewer—it must provide an outlet.

Naturally, that outlet, in view of the fact that the Yazoo river water was flowing in front of the city and down by the intake pipes of the complainant, and that the sewer was contaminating that water and befouling the water supply, (the city being only protected from irreparable damage to health by the voluntary act of the appellee in building a filtering system, which might at times be out of repair or break down from unavoidable causes), should be located beyond the area of danger. If the county can be compelled to tear dow its jail and remove cesspools, why cannot a city be compelled to extend a channel, diverted from its proper uses by making it the receptacle of the excremental matter of a large community, to a point where no danger from its use would result? It is apparent that, in this connection the missing exhibit to Mr. Crumpler's testimony is relevant, for that indicated the location of the original sewer, the lateral sewers and their out-lets and the intake pipes of the waterworks. As we have already indicated, regarding mere questions of expense, the city was not concluded by the order. It had a right at any time within twelve months to apply for an extension, and it follows as a matter of course that if the city was in no financial condition to build this outlet; no court could enforce the liability, and the city would enjoy the same immunity from inconvenience or trouble that is vested in the bankrupt debtor, when threatened by a writ of execution.

We have discussed this proposition at some length, although it does not affect in any material aspect the main questions involved. Conceding the full force and effect that could be given to it, the only result could be

in its elimination from the decree. It is merely a subject incidental to the grave subject-matter of this controversy. We, however, also maintain that it should not be considered at all, except upon the question of a motion to affirm. There is nothing in this assignment of error, which confers upon this court any jurisdiction, and the remedy, if any, is to be found in the Circuit Court of Appeals.

We have presented thus fully the main questions of law and fact involved in the record, although in our opinion, all of them are not material in the consideration of this question of jurisdiction, for the additional reason that we propose to simply refer to them in the discussion of our motion to affirm.

II.

THE MISSING EXHIBIT.

This record, we respectfully submit, is insufficient "the clerk's certificate on its face shows that a certain exhibit is left out." Rule 8, Sec. 1, provides:

"The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record and of the assignment of errors and of all the proceedings in the case under his hand and the seal of the court."

The clerk in this case expressly certifies that an exhibit to the deposition of M. O. Crumpler is not embraced in the record and is missing from the files. It is specifically referred to by Mr. Crumpler in his deposition on an important branch of this case. This court has said, in *Railway Company* v. *Stewart*, 95 U.

S., 279 (284), "it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here."

In the early case of *Keene* v. *Whittaker, et al.*, 13 Pet., 459, a case was presented to this court upon an agreed statement of facts, and was submitted without argument. Mr. Justice Wayne, speaking for the court, said:

"It cannot appear therefore that this court has jurisdiction of the case; which is essential before it can give its judgment in any cause," referring to the 11th and 31st rules of this court then in force, which are practically, so far as this record is concerned, sections 1 and 3 of rule 8.

See also

Redfield v. *Parks*, 130 U. S., 623.

III.

INSUFFICIENCY OF THE ASSIGNMENTS OF ERROR.

We interpose another objection to this record, based upon what we respectfully submit to be a failure to comply with the Revised Statutes and the Rules of this Court relating to assignments of errors. Section 997 of the Revised Statutes, prescribes:

"There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

Section 1012 of the Revised Statutes, is as follows:

"Appeals from the Circuit Courts and District

Courts acting as Circuit Courts, and from District Courts in prize cases, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error."

Rule 35 of this court, among other things, prescribes, that:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

It will be thus observed that both the statute, and the rule of this court, require an assignment of errors, and this court has expressly prohibited by said rule the allowance of an appeal until such an assignment of errors shall have been filed with the court below. In this case, as will appear from an inspection of the record (pages 370 to 372, inclusive), there is a document headed "Assignment of Errors," but not supported by the signature of any counsel, nor does it purport to be signed by appellant. This document, thus alleged to be an assignment of errors, was filed on the 8th day of November, 1904; the petition of defendant for an appeal, which purports to be signed by its solicitors, and which is not so signed by any solicitor, was filed on a subsequent day, November 9, 1904.

We further submit that a paper of such paramount importance, which, according to *Lloyd* v. *Chapman* (C. C. A., 2899), 93 Fed. Rep., 599, "is an essential condition to the granting of a writ or the allowance of an appeal," should bear, like all other pleadings,

the signature of counsel. "As the assignment is a pleading it must be signed by the party or his attorney." Encp. of Pleading & Practices, Vol. 2, p. 960. It imposes no hardship on parties to litigation if they sould be required to authenticate and assume responsibility for all their pleadings and proceedings which become a part of the record, by signing or subscribing the same. The certificate of a clerk would have but little value unless his signature was attached thereto. Any formal proceedings specifically required both by statute and by rule of this court should bear the imprint of some one whom the court can make responsible therefor, and with whom opposing counsel can confer or contend, to insure an orderly and speedy disposition of the case. In this case it is apparent, so far as an inspection of the record is concerned, that a number of counsel were employed by the defendant, and whose names appear from time to time in the papers of this case, that appellee is certainly entitled to an opportunity of knowing who is its opponent.

IV.

MOTION TO AFFIRM.

We have coupled the motion to dismiss with a motion to affirm as is authorized by the rules of this court, and its decisions. This court has repeatedly affirmed "where there is a sufficient color for motion to dismiss, the court will entertain a motion to affirm."

The Alaska, 130 U. S., 208.

And the cases cited in Rose's Digest, p. 185.

"Under subdivision 5, of Rule 6 of the Supreme Court, a motion to dismiss may be united with a motion to affirm, where it is manifest that the writ or appeal was taken for delay, or question on which jurisdiction depends is frivolous."

Rose's Digest, *supra*.

Citing:

Chanute City v. *Trader*, 132 U. S., 212.

It would be, we submit, a needless extension of this brief to insert herein further extracts from the record, or to repeat those already hereinbefore set forth. Even if this court could be held to have jurisdiction of this appeal upon the facts in this record, yet we submit that as practically all the principal legal questions presented are concluded by the first appeal; that as such propositions as are to be deduced from the assignments of error relating to the action of the court below in permitting or refusing amendments, granting continuance, suppressing testimony, are all fruitless, and not entertainable here; that as the action of the court below on the merits, maintaining the integrity of this contract, when the facts not only satisfactorily establish,—but the appellant did not even pretend to question, that the pressure was sufficient, the water furnished wholesome, and the rates reasonable,— is unassailable, the decree should be upheld. Upon what fact going to the merits can appellant base this appeal? We submit, not one. The action of the court in requiring the city to furnish an outlet for its sewage matter does not possess sufficient merit to justify an appeal here. The order in this case is in

its nature somewhat interlocutory; and be that as it may, the application for a hearing should be made in another court.

In view of all the facts and circumstances of this case, the duration of the litigation, the untenable character of the defenses, the absolute lack of proof, when issue is joined upon vital contentions, furnish a reason, we submit, for this motion to affirm.

Respectfully submitted,

MURRAY F. SMITH,
J. HIRSH,
Of Solicitors for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1905.

No. 133.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANT,

vs.

THE VICKSBURG WATER WORKS COMPANY.

Rejoinder Brief for Appellee on Motion to Dismiss and Affirm.

I

We have received copies of the two briefs filed by counsel for the appellant, and in view of their references to the Constitution of the State of Mississippi, at this late date in the controversy, it may be pertinent and proper to make a brief response to their propositions relating to the question of jurisdiction. It is interesting to notice here that notwithstanding the appellant maintained most vigorously that there *was no* Federal question in this case, and has succeeded in prolonging this litigation for over four years, yet it now emphatically insists that there were a number of Federal questions in this case, and particularly asserts that the

learned court below necessarily decided a federal question involving said act of 1900 which is not res judicata.

Notwithstanding the lavish citation of authorities appellant fails to refer in any manner to the Anglo-American Provision Co. vs. Davis Provision Co. No. 2, 191 U. S. 306, cited in our briefs heretofore filed, and have not even attempted to raise an issue upon the propositions we advanced in our said briefs, first, that if this case had been decided against the appellee *on the* merits after it sustained the jurisdiction, the appellee would have no right of appeal; second, that defendant can occupy no better attitude, and having also sustained jurisdiction and procured an adjudication in its favor upon a Federal question, and then failed on the merits, could not prosecute an appeal from a decree against it on said merits; third, that when the Federal question is finally *adjudicated* it is eliminated from further consideration, and neither the plaintiff, nor the defendant, can prosecute an appeal to obtain a review of *that adjudication of such Federal question.*

The appellant therefore is driven to contend that the leaned court below in the rendition of its decree, decided some other Federal question, than that adjudicated in this case on the former appeal.

No one can successfully deny that not only was a *Federal* question *presented* in this case, but *that* question was adjudicated; and this court held in language so plain that he who runs may read "that the ordinance of the City of November 7th, 1900, whereby the Mayor was instructed to notify the Waterworks Company that the Mayor and Aldermen deny any liability upon any contract for the use of the Waterworks hydrants AND THE SUBSEQUENT ACTION OF THE CITY IN HOLDING AN ELECTION TO AUTHORIZE THE

ISSUE OF BONDS TO BUY OR CONSTRUCT WATERWORKS OF ITS OWN (Capitals ours) and in refusing to pay the amount due and payable under the terms of the ordinance do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt BY SUBSEQUENT LEGISLATION OF THE CITY TO DEPRIVE THE COMPLAINANT OF ITS RIGHTS UNDER AN EXISTING CONTRACT (Capitals ours.)" And this court further maintained the remedial powers of a court of equity, in response to the suggestion, "that the bill did not disclose any actual proceedings on the part of the city to displace complainant's rights under the contract" by authoritatively defining these powers, and holding it "is one of the most valuable features in equity jurisdiction to anticipate and prevent a threatened injury—and in protecting the complainant from injuries which if inflicted would be wholly destructive of his rights." It seems needless to state that which are undeniable facts; first, that the city's authority to hold said election was solely conferred by the act of March 9th, 1900, second, that the adjudication of this court did not refer to any one right of the appellee alone, but to *the rights* of the appellee; and, third, when the city undertook to deprive the complainant of its rights under an existing contract it was not only seeking to deprive it of its hydrant rentals, but in its attempt to buy or construct waterworks of its own was inflicting injuries which would be wholly destructive of the appellee's rights.

The strenuous effort of the appellant seems to have but one end in view, and that is, to so emasculate the decision of this court, that it will prove ineffectual in securing to the appellee, that which was the gist and

the main basis of its entire controversy, relief from the inevitable bankruptcy which would result from the city's active competition in supplying water to its own inhabitants at such rates as would be prohibitory so far as the appellee is concerned; or in other words, engaging in the commercial pursuits of supplying water in open hostility to the appellee. When this case again reached the Circuit Court, the learned judge under the positive mandates of this court was compelled to recognize not only that the case presented a Federal question, but that question was, as stated by this court, that the ordinance and the proceedings of the city in holding an election to issue bonds to buy or construct waterworks of its own, contravenes that provision in the constitution of the United States which prohibits the impairment of the obligation of contracts, and he had no discretion in the execution of that mandate, and could not ignore its obligatory force, unless the city, to use the language of this court, "could point to some inherent want of legal invalidity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract." The city wholly failed to find or point out such invalidity, or to introduce any proof authorizing the forfeiture of the contract, and the learned court, therefore, as it was bound to do, rendered a decree for the complainant, or appellee, sustaining said contract, and giving the complainant the relief to which it was entitled.

We think it is only necessary to repeat our contentions in our briefs, that the only "real and substantial claim" in this case, so far as relates to a Federal question, was expressly adjudicated by this court and the

court below strictly pursued the mandates of this court in the determination of that Federal question.

II

It is however insisted that the appellee has no right to this contract. This is not a Federal question, but we respectfully maintain that even this question has already been adjudicated as we have stated in our briefs, in the former appeal. But as appellant devotes several pages of its brief to the contention, "that a public service corporation cannot sell or bargain away its franchise or contracts," it is proper to insert here the Act of the Legislature of Mississippi in force when this contract was entered into in 1886, which appellant has wholly ignored or overlooked. We append the Act (1886, p. 50.)

CHAPTER XXVI.

AN ACT to extend the provisions of Chapter 38 of the Code of 1880 in relation to corporations and other associations, and for other purposes.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That all corporations, except cities and towns and express, telegraph and railroad companies, may be created in the mode and manner and with all the rights, powers, privileges, and immunities as provided in chapter 38 of the Code of 1880.

SECTION 2. *Be it further enacted*, That all corporations created under this act and of said chapter 38, shall have, in addition to the powers, privileges and immunities granted in chapter 38 of the Code of 1880, the following rights, powers, privileges and immunities: That their capital stock shall be unlimited in amount and may be increased by the stock holders from time to time; that they may hold and own real and personal property to any

amount, may sell, exchange and encumber the same; that they may borrow money and secure the payment of the same by a mortgage or deed of trust upon their property and franchises; that they may issue their bonds and secure the same by a mortgage or deed of trust upon their property and franchises, and may sell, exchange, pledge or hypothecate such bonds, and have such other rights, powers and privileges as are necessary and proper to carry into execution the purposes of their organization.

SECTION 3. *Be it further enacted*, That in all actions brought by third persons against corporations created under this act, it shall not be a defence to such action that there was any defect or informality in the organization of such corporation.

Approved, March 7, 1882.

By this Act it is seen that corporations may mortgage their franchises and property, and as the most important franchise that the Vicksburg Water Supply Co. acquired from Bullock & Co. was the franchise or contract to erect, maintain and operate a system of water works, and to furnish at a stipulated price to the City of Vicksburg and its inhabitants an adequate supply of good wholesome water, that franchise or contract was necessarily subject to hypothecation under the laws of the State of Mississippi above set forth, and as a matter of fact gave value to the bonds secured by such hypothecation.

The Vicksburg Water Supply Company embraced said franchise or contract in its mortgage, the mortgage was foreclosed, the property purchased by the Vicksburg Water Works Co., the appellee, and thereby appellee acquired every right of S. R. Bullock & Co., the assignee, the Vicksburg Water Supply Co., which

included said contract or franchise; and to make assurance doubly sure, the Vicksburg Water Supply Co. expressly conveyed by quit claim deed the franchise or contract to appellee. All this appears in the opinion at the former hearing and was proven at the trial; and therefore all the arguments on this subject are now without pertinency.

III

The contract is also assailed because of the provision of the constitution of the State of Mississippi, being Sec. 178, Art. 7. "Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend, or repeal any charter of incorporation now existing and revocable and any that may hereafter be created whenever in its opinion it may be for the public interest to do so, PROVIDED HOWEVER THAT NO INJUSTICE SHALL BE DONE TO THE STOCK HOLDERS (Capitals ours)." If the Act of March 9, 1900, was the basis of the decision of either this court or the circuit court, then, as this court has judicial knowledge of the Constitution of the State of Mississippi, the adjudication of this court was made with that knowledge, and whether erroneous or not is not subject to criticism on the part of the appellant, and the decision of this court is now the law of this case. But we deny the proposition to which both counsel for appellant have devoted so much attention, that the Legislature of the State of Mississippi could impair this contract of November 18, 1886, even if it had attempted to do so. The contract was valid and binding both upon the City of Vicksburg and S. R. Bullock & Co., as adjudicated, we submit, by this court, for it was within the power of the city to make

and it was acted on for fourteen years. Upon the faith of that contract large outlays of money were made; an expensive plant was built; property was mortgaged; bonds issued secured by said mortgage and sold; and heavy and burdensome contractual obligations assumed by Bullock and his assignees. That contract was just as much property in every proper or legal sense as the plant of the Water Works Company. That property was vested in Bullock and his assignees, and the Legislature would have the same power to confiscate and take away the water works plant, as it would have the power to confiscate and take away said contract, the basis of the water works capacity to operate its plant or to serve the public. We apprehend no one would seriously contend that the Legislature could by any enactment despoil the Water Works Company of its plant, its pipes, its mains, its houses, and the debts due it by the inhabitants of the City of Vicksburg for water supplied to said inhabitants under said contract, aggregating many thousand dollars yearly. Yet it is here gravely maintained at considerable length, that the most valuable piece of property the Water Works Company owns, that which really gives it the right and the means to do business, can be purloined by the Legislature of the State of Mississippi under constitutional authority. Appellants argue this case as if the Vicksburg Water Works Company, under the Constitution of 1890, made a contract with the City of Vicksburg to supply it with water. It seems to be oblivious of the fact that this contract was made in 1886, four years before the constitution of 1890 was adopted, and was a binding obligation upon the City of Vicksburg long before all of its numerous counsel had appeared upon the scene of action. If the contract was good in Bullock and his

assignee for four long years, it was unassailable in the subsequent grantee since the constitution of 1890 was in force. If citation to sustain such a plain proposition of common honesty is required, it is to be found in United States vs. Union Pac. Ry., 160 U. S. page 1 and 33, wherein this court graphically proclaimed "it would not be competent for Congress under the guise of altering and amending the act in question to impose upon the Railroad Company duties wholly foreign to the objects for which it was created, or for which governmental aid was given. NEITHER COULD IT BY SUCH ALTERATION OR AMENDMENT DESTROY RIGHTS ACTUALLY VESTED, OR DISTURB TRANSACTIONS FULLY CONSUMMATED. (Capitals ours). We cite also from Rose's Digest: Vol. 1, p. 594.

"(a) Under reserved power to alter or amend a corporate charter, Legislature may make any alterations or amendments which do not defeat or substantially impair objects of grant or rights vested thereunder.—Holyoke Company v. Lyman 15 Wall. 522, 21 L. 133, Bk VII U. S. Notes, 928.

(c) Reserved power to alter, amend or repeal a corporate charter authorizes any amendment which will not defeat or impair the object of the grant, or any vested right, and which the Legislature may deem necessary to secure either that object, or any public right.—Close v. Glenwood Cemetery, 107 U. S. 476, 27 L. 408, Bk X U. S. Notes, 496.

(c) By reservation in law of 1831, State of Maine retained power to alter or repeal acts, corporate rights, privileges and immunities; but rights acquired which do not constitute part of contract of incorporation stand

upon different footings.—Maine Cent. R. R. v. Maine, 96 U. S. 510,511, 24 L. 836, Bk IX U. S. Notes, 470.

(e) The power of a Legislature to alter a charter authorizes any change not substantially impairing the objects of the grant, or any rights vested under it.—New York etc. R. R. v. Bristol 151 U. S. 597, 38 L. 269, Bk XII U. S. Notes. 507."

Some effort has been made to introduce into thi controversy another act which appears on page 35 of the brief of Mr. McCabe, being an extract from the laws of Mississippi of 1904. It is difficult to conceive how by any process of reasoning that case can be linked to this. The Act of 1904 is really an authority for appellee, for the Legislature of the State of Mississippi with due regard for fair dealing, good faith and common honesty, expressly provides in that act that it "shall not be construed so as to impose (impair) the effect or obligations of any valid or binding contract with any waterworks company * * * now existing or heretofore made." Therefore, in order to avail itself of said act the burden rests upon appellant to prove what it has unsuccessfully attempted to do here, that it had no valid or binding contract with the water works company. And finally it is also proper to note that the constitution of the State of Mississippi does not confer upon the legislature an unrestricted right to destroy a corporation, for its power is expressly limited by the proviso "*that no injustice shall be done its stock holders.*" Therefore, if this contract had been made in 1891, instead of 1886, after the constitution of 1890 was in force, and not before it was ever dreamed of, the legislature would have no power to have injured the stock holders and destroyed their property rights by extinguishing this contract.

IV

In conclusion, we think it proper to say we do not consider any of the questions presented by the appellant on the merits, because, we submit, that we have covered all such points in our former briefs, and if any of these propositions had any merit, the forum of relief is the Circuit Court of Appeals and not the Supreme Court of the United States.

Respectfully submitted,

S. S. HUDSON,
MURRAY F. SMITH,
J. HIRSH,
Attorneys for Appellee.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 133.

THE MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANTS,

vs.

THE VICKSBURG WATER WORKS COMPANY.

REJOINDER BRIEF FOR APPELLEE ON THE MERITS.

S. S. HUDSON,
MURRAY F. SMITH,
J. HIRSH,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

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MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, APPELLANTS,

vs.

THE VICKSBURG WATER WORKS COMPANY, APPELLEE.

REJOINDER BRIEF FOR APPELLEE ON THE MERITS.

This honorable court having postponed the hearing of the motion to dismiss and affirm until the hearing on the merits, we deem it proper, although we have in our briefs on the motion discussed at some length the merits and made numerous extracts from the record, to briefly repeat, that upon every *material question* relating to the merits not only was appellee's contention sustained by the proof, but the appellant practically abandoned any effort to maintain its contentions in that respect. We submit, it was proved beyond successful denial.

FIRST.

THE QUALITY

Of the water was of the best character.

SECOND.

THE QUANTITY AND PRESSURE

In every respect satisfied the terms of the franchise.

THIRD.

THE RATES AND REGULATIONS

Were by the uncontroverted testimony shown to be reasonable, and for all practical purposes the appellant made no effort to dispute the fact thus established by proof, that they were reasonable.

FOURTH.

THE TITLE.

We have shown in rejoinder brief, page 5 *et seq.*, that under the acts of the State of Mississippi of 1882 (1882, p. 50) the franchise or contract which constituted the most valuable asset of the Vicksburg Water Supply Company, the immediate assignee of S. R. Bullock & Co., could be mortgaged; that it was mortgaged and the mortgage was foreclosed, and the franchise or contract bought at foreclosure sale by the appellee, and that, to strengthen its title so as to place it absolutely beyond question, the said Vicksburg Water Supply Co. transferred by quitclaim deed said contract or franchise to the appellee, all of which is set forth in the opinion of this court.

Fifth.

The Power of the City to Make Contract.

That the city had the power to make the contract for the erection and maintenance of the water-works system with an individual or corporation is clearly recognized by this court in the opinion on the first appeal; it also expressly results from the direct enactment of the legislature of the State of Mississippi authorizing such contract; and such contracts are in accord with the public policy of the State of Mississippi, and are sustained by the supreme court of Mississippi, as shown by the case of The Light, Heat & Water Company *vs.* City of Jackson, 73 Mississippi, p. 598; and the court will observe that in that case, as appears on page 606, the city of Jackson granted "to said company the exclusive right and privilege to have, maintain and operate the franchises granted by the charter of said company in said city for the period of twenty-five years from the date of the execution of this contract."

The later adjudication is John B. Reid *et al. vs.* Trowbridge *et al.*, 78 Miss., p. 542.

Sixth.

The Hydrant Rentals.

The obligation of the city to pay for the use of the hydrants during the contractual period, if the city had the power to make the contract, is not now seriously denied by the appellant, as we construe its argument, nor can it be successfully controverted. Under the assignments of error and the arguments of counsel, the right to these hydrant rentals must be regarded, we respectfully submit, as practically conceded. Mr. McCabe says (page 38 of his brief), if the city had the right to preclude itself, "then it must be held to have precluded itself only to the extent fixed by the contract."

SEVENTH.

THE AMENDMENTS.

The action of the court in refusing the amendments has been discussed at some length in our former briefs and we do not deem it necessary to again refer to them.

EIGHTH.

THE MINOR QUESTIONS,

Such as those relating to the extension of the sewer, do not affect the material controversy in this case, and could only, even if error was committed, result in the reversal of so much of the decree as contains the error.

NINTH.

THE OTHER MINOR QUESTIONS,

Such as motions for continuance, have been referred to at sufficient length, we submit, in our briefs and it is unnecessary to consider them further.

TENTH.

THE CONTRACT IS EXPRESSLY PROTECTED BY THE CONSTITUTION OF THE STATE OF MISSISSIPPI.

In addition to our argument based upon the constitution of the State of Mississippi and the adjudications of this court protecting vested rights (Rejoinder Brief, page 7 *et seq.*), we further submit that the constitution of 1900 expressly protects and *continues* this contract.

Schedule, section 279, expressly provides:

"ALL CAUSES OF ACTION AND RIGHTS OF INDIVIDUALS AND BODIES CORPORATE AND CHARTERS OF INCORPORATION SHALL CONTINUE." [Capitals ours.]

Thus conclusively showing that the framers of the *organic law* did not intend to license repudiation.

Eleventh.

The Issue Based upon the Term "Exclusive" Has Been Adjudicated.

The main contention of the appellant on the merits is presented in Mr. McCabe's brief, on pages 36–39, and by Mr. Bryson, on pages 51 to 70, both inclusive, and the entire argument on this subject on said pages involves the effect of the word "exclusive" in the franchise granted to Samuel R. Bullock & Company. We respectfully submit that this "is threshing over old straw." On the first hearing of this case, Mr. L. W. Magruder, as the counsel for the city, in his brief pressed upon the attention of this court the very issue upon which the appellant now demands a hearing. We make the following extracts from his brief. Page 11 he said: "We contend that said city was not empowered to grant to appellant the exclusive right to maintain and operate a system of water works."

Again: "If appellant's right be contravened in the premises, it must result from the building of the works, the result must come from the *exercise of the power* and not from the naked grant of such a power."

On page 13 he says:

(1.) "The validity of a claim of an exclusive privilege will be decided on the question of jurisdiction if the right is determinable by construction upon the face of the law."

(2.) "No exclusive privilege was granted to appellant."

Page 15: "But in cases such as this the real and single question as to whether any contract right exists at all lies upon the very face of the contract itself, which is set out from the necessity of the case by the appellant in its bill, then it would seem that the question so presented is one of jurisdiction to

be passed upon as such. NOTHING MORE CAN BE DONE BY WAY OF PLEADING OR PROOF TO EFFECT THE ISSUES PRESENTED AS TO THE VALIDITY OF APPELLANT'S CONTENTION FOR AN EXCLUSIVE PRIVILEGE. THE ISSUE IS COMPLETELY MADE UP. ALL THE LAW AND ALL THE FACTS ARE BEFORE THE COURT. NOTHING CAN BE ADDED TO THEM UPON ANY TRIAL. ITS SOLUTION RESTS ALONE UPON THE PROVISIONS OF THE LAW AND THE TERMS OF THE CONTRACT." [Capitals ours.]

Again, *ibid:* "If appellant has an exclusive right to maintain water works as provided in the contract, it is a question which can only be resolved by determining the extent of the municipal powers of said city under the act of the legislature authorizing the contract. Whatever rights the appellant has in this respect must be determined, *ex vi termini*, by the very terms of the statute."

Page 16: "The validity of its claim must be resolved upon the very face of the law which it says has been impaired. In such a case no good purpose can be served by remanding for trial to the court below the question of the validity of the appellant's contract based upon the interpretation of the statute. If upon the face of the statute and of the contract the appellant has 'no exclusive privilege,' if every fact necessary to its decision is now before this court, why should it not now be determined as a jurisdictional question? If the whole controversy may at once be settled by finding that the appellant has no exclusive privilege, it would be a tedious and costly delay to postpone the determination of that question and a trial upon its merits and a second appeal." It thus appears that the city itself demanded from this court an express adjudication, so as to thereby avoid further trial on the merits and a second appeal, and, as we understand the language of this court, the court responded to the request and held, as we have heretofore maintained, that the appellant then, appellee now, had, on the face of the pleadings, an unassailable con-

tract. But the counsel for the city was not satisfied with its own emphatic language above quoted, and on page 17 *again* insists: "If it shall appear clearly as a matter of construction that the exclusive grant to appellant was not authorized there would be no room to apply the constitution."

Page 21: "THE SOLE QUESTION BEFORE THE COURT AS TO THE IMPAIRMENT OF THE OBLIGATION OF APPELLANT'S CONTRACT IS WHETHER THE POWER OF THE CITY TO BUILD ITS OWN WORKS IS SUCH AN IMPAIRMENT." [Capitals ours.]

"The ordinance granting to appellant the exclusive privilege to maintain and operate a system of water works was to that extent illegal and void."

Page 24: "The franchise grant to the appellant, and whatever right it possesses under that contract for compensation for the use of its hydrants is not involved in this case, because whatever right it possesses in these respects can be enforced notwithstanding the city may build its own water works."

"Neither the acts of March, 1900, nor anything done in pursuance thereof by the city have the legal effect to any extent to impair any of the rights of the appellant under his contract *except the sole right to the exclusive privilege mentioned.*" And appellant cited, among other cases, Freeport Water Co. *vs.* Freeport City, 180 U. S., 598. The appellant then, the appellee now, pages 25 and 26 of its brief, said: "It is unnecessary to contend here that the word 'exclusive' or any other part of the contract would preclude the city from granting another franchise to a third party. The city is not attempting to grant another franchise, nor is any other third person offering to either supply the city or its inhabitants with water."

Page 26: "It can be asserted in this case, as in the Walla Walla case, that the plain intent of the franchise as shown not only from the use of the word 'exclusive,' but also from the context and from the condition of the contracting parties, was that the city should not compete with the complainant."

Thus it will be seen, as we have already contended in our former briefs, that the question now argued by appellant, based upon the word "exclusive" and its legal effect, as against the city itself was also the question urged upon this court upon the former appeal, and, as we contend, decided in favor of then appellant, now the appellee. It was in view of the arguments that we have quoted that the result announced was reached, and this court held:

"It cannot be seriously contended that under the act of March, 1886, authorizing the city to provide for the erection and maintenance of a system of water works and to contract with a party or parties to build and operate water works, and under the ordinance of the city of November 18, '86, providing for a supply of water to the city and its inhabitants, by contracting with Samuel R. Bullock & Co., their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Co., no contract was entered into. THE SUBJECT-MATTER OF THE CONTRACT WAS IN THE POWER OF THE CITY TO MAKE; THE TERMS WERE EXPLICITLY SET FORTH IN THE ORDINANCE [capitals ours]; the works erected were approved by the city; and the respective obligations created by the contract were duly complied with without question or complaint for a period of fourteen years."

And again: "We think that the ordinance of the city of November 7th, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrant, AND THE SUBSEQUENT ACTION OF THE CITY IN HOLDING THE ELECTION TO AUTHORIZE THE ISSUE OF BONDS TO BUY OR CONSTRUCT WATER WORKS OF ITS OWN, [capitals ours] and in refusing to pay the amount due and payable under the terms of the ordinance—disclose an intention and attempt by subsequent legislation of the city TO DEPRIVE THE COMPLAINANT OF ITS RIGHTS UNDER AN EXISTING CONTRACT: [capitals ours] and that therefore, unless the city can

point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question." Under this decision the circuit court below maintained its jurisdiction and granted relief in accordance with the mandate of this court. The Walla Walla case and the Los Angeles case were specially referred to in the former appeal.

If the grant of the exclusive right to construct and maintain a water-works system for a period of thirty years conferred no rights as against the city, it seems to us that it would have been an idle ceremony to do what appellant's counsel protested in his brief should not be done, to go through the form of a trial, if the appellee had no rights to be protected by such trial. But this case was sent back to the court below with the express direction of this court with the formal language of the mandate for the court below to recognize the existence of the Federal question and to execute the will of this court as expressed in its decision.

We respectfully maintain that when the city granted to S. R. Bullock & Co. and assigns "the exclusive right and privilege—for a period of thirty years of erecting, maintaining and *operating a system of water works*," and granted the use of the streets and stipulated for the *free use* of water for certain purposes, and for *an appraisement of the water-works plant every ten years* in the event the city desired a plant, that the city by *express* grant, and not by *implication*, precluded itself from building any water works of its own during the limited period of thirty years, which measured the life of this contract. * * * Clearly, as is announced in the Walla Walla case, the city had the right to say that it would not erect a water-works system of its own within thirty years, and that statement can be made just as effective

by *one* word as by a hundred, and when the city inserted the word "exclusive" in this contract it expressly contracted, we submit, by the very use of the *word*, that it would not become a competitor itself of this appellee.

In the Walla Walla case it will be noticed that by the act of the Territory of Washington the city of Walla Walla, although authorized to provide a sufficient supply of water and grant the right of the use of the streets of the said city, yet the act conferring the authority expressly provided "that none of the rights or privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others." Nevertheless, this court held valid and obligatory this provision of the contract with the Walla Walla Water Company: "And until such contract shall have been so avoided the city of Walla Walla shall not erect, maintain or become interested in any water works except the ones herein referred to save as hereinafter specified." This court further said: "Cases are not infrequent where under a general power to cause the streets of a city to be lighted or to furnish its inhabitants with a supply of water without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city in the exercise of an undoubted power to make a particular contract can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party." In the case at bar there is an express provision in the contract authorizing the city of Vicksburg at the expiration of each period of ten years after the ordinance takes effect to purchase said system of water works, and we maintain that this is the measure of the city's rights so far as the acquisition of the water works is concerned during the period of thirty years.

Not a single case is cited by appellant, as we contend, which militates against this view. What new light has ad-

ditional counsel thrown upon this subject? We submit, none. And appellee is not contending that another party, *who is not a party to the contract*, cannot build.

We further respectfully submit that if the proof had shown that the rates for the city and its inhabitants had been extortionate (as averred by the city), and so unreasonable as to shock the conscience of the court, that might give some reasonable ground in a court of equity that the city should have the right to build a plant of its own to relieve the oppressed condition. But when we find the *uncontroverted proof* that the rates and regulations are without question reasonable both as to the city and its inhabitants, there is no reason for the complaint by the city to build a plant of its own.

In other words, when the rates are proven without question to be reasonable THE MONOPOLY IDEA IS ROBBED OF ITS NAME, and the city knew so well that the rates were so reasonable that there was no use to even try to disprove the fact. Under such conditions, together with the further fact that the water company was and had been a financial failure for the long period of over fourteen years after the construction, and thereby necessitated the foreclosure of the first-mortgage bonds on account of default in interest, we submit, the city should not be allowed to repudiate its solemn contract that it would not build a water-works plant of its own during the life of the contract. If the city desires a plant of its own during the life of the contract, she has provided herself with a way to get it, *by a fair way*—the appraisement of the present plant. This can be done within the next twelve months, which is a much shorter time than she could build one.

The only cases cited by appellant that we think at all pertinent to be considered are those cases decided by this court *subsequent* to the decision of this court on the former appeal, because every other case cited decided prior to that

time by every rule of construction is necessarily precluded and disposed of by the former appeal.

We will notice, therefore, only such subsequent cases. Mr. McCabe collected them together, without citations therefrom, on page 37 of this brief. They are—

Skaneateles W. W. Co. *vs.* Skaneateles, 184 U. S., 354;
Knoxville W. W. Co. *vs.* Knoxville, 189 U. S., 434;
Helena W. W. Co. *vs.* Helena, 195 U. S., 383;
Bienville W. W. Co. *vs.* Mobile, 186 U. S., 212; and
S. W. M. O. Lt. Co. *vs.* Joplin, 191 U. S., 150.

In addition to these Mr. Bryson refers to Oshkosh Water Works Co. *vs.* Oshkosh, 187 U. S., 437.

"The positive authority of a decision," as announced by Chief Justice Marshall in Ogden *vs.* Saunders, 12 Wheat., 213, "is coextensive only with the facts upon which it is made," and we will briefly refer to the *facts* in the cases above mentioned.

In the Skaneateles case it appears "on April 5th, 1887, the village of Skaneateles granted a franchise to the water works company to maintain and operate within the village a system of water works for furnishing pure and wholesome water to the village and its inhabitants, under which the company constructed its works, and on February 1st, 1891, contracted to supply water to the village and its inhabitants for the period of five years. At the expiration of the term of this contract some differences arose about the terms of its continuation, which resulted in the construction of an independent system of water works by the village authorities."

This court held upon this state of facts, among other things, that the water company "acquired no contract right, express or implied, to an exclusive privilege of using the streets of the village or supplying it with water."—"That when the contract for five years had expired there was nothing in the State legislation upon which to base an im-

plied contract." But in the case at bar there was a contract giving an exclusive privilege, not only to maintain, but to operate, a system of water works for thirty years.

In Bienville Water Supply Co. *vs.* Mobile, 186 U. S., p. 212, 218, this court says: "In the first place, the plaintiff did not receive the exclusive right to supply Mobile with water. The proviso in the charter reserved to the State the power to charter other companies for such purpose. Obviously the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary in order to furnish an adequate supply for the growing city and reserved to itself the right to make such provision as it should deem expedient therefor.

The court held "that the plaintiff took this charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and it had not at the time of the transactions referred to in the pleadings obtained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply in the county." The court said, on page 218: "The plaintiff had not at the time of these transactions obtained the Stein franchise for obtaining water from Three-mile creek, and could only claim an exclusive right of obtaining water from other sources of supply within the county of Mobile."

It is also to be noted that under the constitution of Alabama a grant of a monopoly is forbidden (page 223), and by a separate section of the constitution it is affirmatively declared that the legislature shall pass no act making an irrevocable grant of special privileges or immunities.

The constitution of the State of Mississippi at the time this contract was entered into contained *no such* provision; in other words, duly authorized contracts were *not* revocable. Besides, under the constitution of the State of Mississippi, section 279, it is expressly provided "all causes of action and rights of individuals and bodies corporate and of the

State and all charters of incorporation shall continue." Section 16 provides "*ex post facto* laws or laws impairing the obligation of contracts shall not be passed." This same section is embodied in the constitution of the State of Mississippi of 1869.

In Knoxville W. W. Co. *vs.* Knoxville, 189 U. S., p. 434, the question of the exclusive privilege therein granted to construct water works was not considered by the court. The only point decided was the effect of an agreement on the part of the company "to supply private consumers at not exceeding five cents per hundred gallons." In view of the fact that the city subsequently to said contract passed an ordinance reducing the price of water to private consumers below that rate, the court said, page 436: "The trouble at the bottom of the company's case is that the supposed promise of the city upon which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication."

In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, and not the part devoted to the promises of the city or that which contains the still later mutual agreements; they are the words of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities cannot complain of them nor repudiate them, nor can the company which they have formed.

In Joplin *vs.* Southwest Missouri Light Company, 191 U. S., p. 150, it appears that the city of Joplin on October 7, 1891, granted "the right to erect and maintain an electric light plant to certain persons, naming them, their successors and assigns, for a period of twenty years." The ap-

pellee is the successor of the original grantees. In March, 1899, the city issued bonds to the amount of thirty thousand dollars "for the purpose of erecting an electric light plant to be owned, controlled and operated by the city."

It was contended in that case that as the city had the choice to make a contract with private individuals, or to build an electric plant of its own, that having made a contract with private persons "the city contracted not to build works of its own." The court said, pages 156 and 157: "The appellee concedes as we have seen that it has no exclusive right and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it and if the city can not the city is left with a useless potentiality while the appellee exercises and enjoys practically an exclusive right."

It is readily perceived there is no similarity between that case and the one now under consideration. In *this* case the city expressly granted the exclusive privilege not merely to supply water for the use of the inhabitants of the city, but exclusively to *construct and operate* a system of water works. In the Joplin case there was practically only a privilege given to the electric light company to supply private lights for the use of the inhabitants, and to construct an electrical plant and erect poles.

In Oshkosh Water Works Co. *vs.* Oshkosh, 187 U. S., p. 437, this court decided: "The legislature may not withdraw all remedies, and thus in effect destroy the contract; nor impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract, according to the course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But the legislature may change existing remedies or modes of procedure, without impairing the obligation of contracts, if a substantial or efficacious remedy remains or is provided, by means of which a party can enforce his rights under the contract."

Helena Water Works Co. *vs.* Helena, 195 U. S., p. 383, we submit, is really an authority for the appellee. This court held: "Under the constitution and laws of Montana a grant by a municipality to a water-works company of the right to erect and maintain water works WHICH EXPRESSLY DECLARES THAT IT IS NOT EXCLUSIVE, DOES NOT RAISE AN IMPLIED CONTRACT THAT THE GRANTOR WILL NOT PROVIDE ITS OWN WATER SUPPLY DURING THE TERM OF THE FRANCHISE." [Capitals ours.]

It will thus be seen that in the Helena case *not only was there no implied agreement* to grant an exclusive right, but there was an *express stipulation* that the grant should not be exclusive, while in this case the *city expressly makes* the grant exclusive. The reasoning of the court is also applicable here as we construe it. This court, after referring to certain clauses of the contract, says, p. 391: "If these sections can be construed to amount to a contract between the city and the company, binding the city to take its entire supply of water from this company for five years, which would be broken by the erection or building of a plant by the city to supply itself with water, it had expired before the beginning of this suit and the contract as it existed after the expiration of the term named in section 6 must be found in other sections of the ordinance. The contention is that as by section 26 the water company was bound during the term of the agreement which it is claimed, is twenty years, to provide all the inhabitants of the city, whatever their number, with a water supply, this contract will be impaired and its benefit to the company destroyed if the city should erect an independent plant of its own."

The court seemed to concede the strength of this position, but says further: "But in our view, this section must be read with section one, which requires the company to furnish water to such inhabitants of the city as desired to purchase the same, or to take water from the company beyond the term of five years, expressly provided in section 6.—

There is nothing in section 26 nor in section one undertaking to bind the inhabitants of the city to take water from the company.—Properly construed, we think this ordinance shows an agreement upon the part of the company to furnish water to the inhabitants of the city at not exceeding certain maximum rates, and to the city itself, upon terms to be agreed upon, made definite, as far as the city was concerned, for the term of five years. As thus interpreted, we do not find anything in this contract that prevents the city, CERTAINLY AFTER THE EXPIRATION OF FIVE YEARS, FROM CONSTRUCTING ITS OWN PLANT. [Capitals ours.]

We maintain here that the city has by the use of the word "exclusive" precluded itself from building a water works, so far as it is concerned, during a period of thirty years, nineteen of which have already expired, and it is admitted that *after* the expiration of the thirty years appellee would have no exclusive right to furnish the city with water, and the city would then have the right to build its own water works.

We have thus reviewed the main cases upon which the appellant relies, and we respectfully contend that there is practically no resemblance between the facts presented by those cases and the one at bar, and, therefore, they cannot be regarded as authorities sustaining the appellant's contention.

A recent discussion of the respective rights of a municipality and a water works company when an exclusive privilege is granted is presented in Farmers' Loan and Trust Company *vs.* City of Sioux Falls *et al.*, decided by the circuit court of appeals, eighth circuit, March 31, 1905, 136 Fed. Reporter, 721–729. The court said: "It is difficult to see the force of the contention that on account of once making a contract with the plaintiff for twenty years the city irrevocably bound itself by an implied contract never to construct and maintain a water-works system of its own. While it is doubtless true that the erection of such plant by the city

will render the property of the water company less valuable, yet the city was not bound by the contract to refrain from exercising its powers to construct and maintain water works after the expiration of the twenty-year period provided in the contract. The contract by its terms ceased to have effect after April 9, 1904, and the subsequent construction and operation of water works by the city for its own benefit and the benefit of its citizens would not, we think, be a violation of any of the express or implied provisions of the contract. The city undoubtedly had the power by an express contract to renounce its authority to construct and maintain water works itself during a time during which it would be proper and lawful to grant the privilege to a third party. Walla Walla *vs.* Walla Walla W. Co., 172 U. S., p. 1. Recognizing this rule the city treated the contract as a binding contract upon it for twenty years. In its answers both to the bill and the cross-bill it is alleged that the city had no intention of operating the system of water works which it proposed to build until after the expiration of the contract between the city and Kuhn and for the full term of twenty years both the city and the water company have performed their several obligations under the contract."

If this case presented a question whether the city of Vicksburg would have a right to build water works *after* the expiration of the thirty years, there would have been no litigation instituted in the circuit court of the United State for the southern district of Mississippi. But the city of Vicksburg did not do as the city of Sioux Falls did, wait until the end of the contractual period before it undertook to annul and defeat its own solemn franchise, but after receiving for nineteen long years the benefits of the contract securing it fire protection, free water for certain purposes, and securing for its inhabitants good wholesome water it cannot now, we contend, even if this contention had not already been sustained by this court, ignore the term of its own contract wherein

it is excluded from constructing a water works of its own and destroy the value of appellee's property by entering into active competition with it and thus not only prevent it furnishing the city with water, but to all practical intent and purpose by forcing it into bankruptcy deprive it even of the benefit of the hydrant rental.

We do not deem it necessary to review the cases cited by appellee from Rhode Island and Minnesota, for we submit that the doctrine maintained in the Walla Walla case, 172 U. S., is decisive of the question here involved, even if it could be held that that question was not adjudicated on the former appeal in this case, which we respectfully maintain was. Mr. Cook in his very recent work on Corporations, fifth edition, page 2760, says: "Where a city has power to construct its own water works, or to contract with a company, and it makes a contract, it cannot then construct its own works, its power being exhausted," citing Troy Water Company *vs.* Borough of Troy, 200 Pa. St., 453 (1901). Again on page 2761 he says: "Where a municipality breaks its contract with a water works company for a supply of water and erects its own works it is liable in damages sufficient to make the company whole for the breach."

Twelfth.

The Interest of Appellee in This Contract.

We have considered at some length in our former briefs the facts in this case which relate to the merits, and that upon final hearing the appellant abandoned in effect every defense involving the consideration of the quality of the water, the character of the pressure, and the reasonableness of the rates. We have also referred to the act of 1904 and the provisions of the constitution of 1890 maintaining that as this contract was valid in Bullock it is valid in Bullock's assigns and protected even by the act of 1904 from assault and protected by the decisions of this court, which we also quoted, and it is further protected by section 279 of the con-

stitution of the State of Mississippi, which provides: "All writs, actions, causes of action, proceedings—and rights of individuals and bodies corporate—and charters of incorporation shall continue."

But the appellant in its eagerness to secure *some relief* has persistently argued that the appellee had parted with its interest in this contract *pendente lite*, and the effect of the argument, therefore, is that, notwithstanding the Federal court *has jurisdiction*, the contract *is valid*, that the city is *bound by it*, and that the Vicksburg Water Works Company acquired *it*, yet, on account of some transaction between the Vicksburg Water Works Company and the City Water Works and Light Company of Dakota, the cause should have been decided adversely to appellee. We have devoted some attention to this proposition in our discussion of the second assignment of error in our former brief, pages 20 *et seq.* We will briefly repeat our contention. The appellant ignores its own deliberate agreement made at the January term, 1904, on its own application, in conjunction with appellee, to try this case at the May term, 1904, at Jackson, Mississippi. It deliberately fails to notice the decisions of this court to which we have referred in our discussion on the first assignment of error, particularly the case of Chapman *vs.* Barney, 129 U. S., 167, wherein this court upheld the right of the court below to substitute a *new sole plaintiff* in place of a sole original plaintiff, which we submit is clearly authority to sustain the act of the court below in *retaining* the sole original plaintiff. But appellant by this *argument* places itself in the indefensible attitude, we submit, of deliberately and solemnly pleading *a fact* as a defense in the court below and seeking to ignore it by a mere argument. On pages 111–112 of the record the court will see that the appellant plead, and this plea has never been withdrawn from the record, in substance and effect that the City Water Works and Light Company *never* purchased the property of the Vicksburg Water Works Company, does not *own any of its rights*, nor has any interest whatever in the subject matter of this suit. This is its own

deliberate plea, solemnly attested by the signature of its counsel, and, until it is withdrawn from the record, is absolutely binding and conclusive upon the appellant. We submit that no litigant can be permitted to take one position in the court by its plea, and then seek to destroy its effect by its argument. If there is anything in the doctrine of estoppel, this appellant is forever estopped to make the point that a company which it solemnly declared had no interest in the litigation can defeat this appellee merely because the appellant in its brief insists that it ought to be made a party. We further submit that this is a case of a mountain laboring, with the mythological result. What the appellee wanted and what the court granted was a trial on its merits. What the appellant seems to want is to avoid all the way through this litigation just such a trial, and now, at the last moment, it proclaims: "You are out of court because at one time there were negotiations between the Vicksburg Water Works Company and the City Water Works and Light Company," which the appellant itself proclaims was without avail. The appellant demanded in effect that the Vicksburg Water Works Company should remain the sole complainant, and when it is accommodated it now complains. The only practical interest that the city could have in the negotiation between the Vicksburg Water Works Company and the City Water Works and Light Company was to be protected from needless litigation and from the payment of the hydrant rental to two different parties. Again, the city maintained that the Dakota Company had no interest in the litigation. The Vicksburg Water Works Company acceded to that proposition. The Dakota Company admitted that proposition by retiring from the litigation. The City Water Works and Light Company could set up no claim after such conduct to any rights against the city involved in this litigation. If the contract is valid and indefeasible and vested in the Vicksburg Water Works Company, as we contend, then it was a valuable

property right which could be hypothecated and sold by it. But whether that be true or not, the city certainly is unharmed until the City Water Works and Light Company maintains a claim to the contract. If that event occurs, and it cannot occur unless there is some further negotiations between the parties, because the City Water Works and Light Company is estopped to make any claim by its own act in withdrawing from the litigation, the city's rights are in no respect impinged. If the contract is valid, as we have maintained, between the Vicksburg Water Works Company and the city, all that is necessary for the city to do is to comply with its terms, so far as the Vicksburg Water Works Company is concerned. Should any other claimant appear, its rights can then be determined, but we think we may be permitted to respectfully say that it is a singular proposition for appellant to maintain, after having unequivocally put itself on record denying the right of the Dakota Company to any interest in this litigation, and having even maintained in the supplemental answer, which it was not permitted to file, that the Vicksburg Water Works Company could not discharge its obligations to the city and assign its franchise to any other company, that *the Vicksburg Water Works Company* have absolutely no *rights in the premises*, and must go hence without relief.

The attempt to maintain by argument that appellee is estopped to impeach the validity of the act of 1900 because Mr. McFarland, the former superintendent of the Vicksburg Water Supply Company, after the execution of the mortgage under which the appellee claims, favored or contributed to the passage of the act is, we contend, so absolutely without merit that any discussion is needless.

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